Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N.,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Illinois Supreme Court held that a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks is categorically not susceptible to challenge under the Takings Clause of the Fifth Amendment because, in that court's view, "regulatory actions requiring the payment of money are not takings." The question presented is:

Whether the State's taking of money from private parties is wholly outside the scope of the Takings Clause.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that Empress Casino Joliet Corporation is a wholly-owned subsidiary of Hollywood Casino Corporation, which in turn is wholly owned by Penn National Gaming, Inc., a publicly traded company. Hollywood Casino Corporation is a wholly-owned subsidiary of Argosy Gaming Co, which is also a wholly-owned subsidiary of Penn National Gaming, Inc. Petitioner Elgin Riverboat Resort d/b/a Grand Victoria Casino, an Illinois general partnership, is a joint venture between Nevada Landing Partnership, an Illinois general partnership, and RBG, LP, an Illinois limited partnership. Nevada Landing Partnership is wholly owned by MGM Mirage, which is a publicly traded company. RBG, LP is privately owned. Petitioner Des Plaines Development Limited Partnership is an Illinois limited partnership, of which Harrah's Illinois Corporation is the 80% General Partner and Des Plaines Development Corporation is the 20% Limited Partner. No publicly owned company owns 10% or more of Des Plaines Development Limited Partnership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Empress Casino Joliet Corporation, Des Plaines Development Limited Partnership, Hollywood Casino-Aurora, Inc., and Elgin Riverboat Resort ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App., *infra*, 1a-33a) is reported at 896 N.E.2d 277. The opinion of the Illinois Circuit Court (App., *infra*, 34a-50a) is unreported. The order denying petitioners' petition for rehearing (*id.* at 55a) is unreported, but published at 2008 Ill. Lexis 892.

JURISDICTION

The Supreme Court of Illinois entered its judgment on June 5, 2008. That court denied petitioners' timely petition for rehearing on September 22, 2008. On December 10, 2008, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 21, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of 230 ILCS 10/7, are reproduced in the appendix to this petition. App., *infra*, 56a-64a.

STATEMENT

This case involves a constitutional challenge to an Illinois statute that requires petitioners, who own four of the nine casinos in the State, to transfer 3% of

their adjusted gross receipts to Illinois horse-racing tracks, for the ostensible purpose of improving the financial health of the Illinois horse-racing industry. Petitioners contend that this law – which appropriates some of their property and awards it outright to their competitors – effects a taking of that property within the meaning of the Fifth Amendment's Takings Clause. There is no doubt that the Takings Clause would have been implicated had the State expropriated a portion of petitioners' real estate, intellectual property, slot machines, or stock certificates, and transferred *that* property to the racetracks. But because the State instead took petitioners' *money*, the Illinois Supreme Court rejected their takings claim, holding that the appropriation of petitioners' revenue "is not subject to a takings challenge" *at all* because "regulatory actions requiring the payment of money are not takings." App., *infra*, 25a-26a.

The question whether and in what circumstances money may be the subject of a constitutional "taking" is a recurring one that arises with great frequency in a wide range of contexts. It has divided the lower courts; although some agree with the rule applied below in this case, others have held that the expropriation of money *does* effect a taking. The last time this Court addressed the question, in *Eastern Enterprises, Inc.* v. *Apfel*, 524 U.S. 498 (1998), it failed to produce a controlling opinion, an outcome that has exacerbated the confusion and disagreement on the subject in the lower courts. Yet the question is one of great practical importance: the rule that the Takings Clause affords no protection against the exaction of money encourages abusive governmental actions that "force[] some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Review by this Court to settle the controlling rule accordingly is essential.

1. Nine riverboat casinos are currently licensed and operating in Illinois. Five casinos are located in the central or southern portions of Illinois. The other four operate near Chicago in Aurora (the Hollywood Casino), Elgin (the Grand Victoria), and Joliet (Harrah's and the Empress Casino). Illinois Gaming Board, 2007 Annual Report 20, available at http://www.igb.state.il.us/annualreport. Petitioners own the licenses for the four Chicago-area casinos, which enjoy higher adjusted gross receipts ("AGR") than their downstate counterparts. *Id.* at 15.[1]

There are five Illinois tracks that feature live horse racing. See App., *infra*, 1a-2a. On-track betting at these tracks has declined over the past fifteen years; racing interests blame the lure of riverboat gaming for the change. See *id.* at 3a.[2] In response to the racing industry's concerns, in 1999 the Illinois General Assembly lowered the tracks' tax burdens by approximately two-thirds. 230 ILCS 5/27. At the same time, the legislature provided that 15% of the wagering taxes paid by a tenth licensee would be paid into a "Horse Racing Equity Fund" for the bene-

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[1] "'Adjusted gross receipts' means the gross receipts [from wagering] less winnings paid to wagerers." 230 ILCS 10/4(h).

[2] The connection is debatable. Purses increased for thoroughbred racing from 1992 to 2007, hitting a peak in 2002 after almost a decade of competition from riverboats; most of the decline is attributable to reduced interest in harness racing. Illinois Racing Board, 2007 Annual Report 8, available at http://www.state.il.us/agency/irb/racing/reports.

fit of the tracks (230 ILCS 10/13(c-5)). That subsidy has not yet gone into effect because until very recently the tenth license was mired in litigation.

2. In 2006, Illinois imposed the charge on casinos that is at issue in this case. Initially, the legislature considered a proposed surcharge on the AGR of all but the smallest of the Illinois casinos, which would be used to subsidize the racetracks. H.B. 1917, 94th Gen. Assemb. (Ill. 2006). After that measure twice failed to obtain the votes needed for passage, the legislation was modified so that the surcharge would be imposed only on those casino licensees that had AGR above a specified amount in 2004. H.B. 1918, 94th Gen. Assemb. (Ill. 2006). This threshold limited the statute's reach to the four Chicago-area casinos operated by petitioners, exempting the five "downstate" casinos. The legislation, Public Act 94-806 ("the Act") (reprinted in relevant part at App., *infra*, 56a-61a), passed in this form.

After declaring that riverboat gaming has had a negative impact on horse racing (see Public Act 94-806, § 1(1)-(2), App., *infra*, 56a), the Act provided that, "as a condition of licensure" and in addition to a $5,000 annual licensing fee, all casinos with AGR above $200 million in 2004 – in practice, the Chicago-area casinos – were, on a going-forward basis, to pay 3% of their AGR into the "Horse Racing Equity Trust Fund." 230 ILCS 10/7(a), App., *infra*, 60a. This 3% surcharge, paid on a daily basis, was "in addition to any other payments required" by Illinois law (*ibid.*), including wagering taxes imposed by 230 ILCS 10/13. Petitioners were required to pay the surcharge for "a period of 2 years." 230 ILCS 10/7(a), App., *infra*, 60a.

The Act divided the surcharge proceeds into two categories. Sixty per cent of the proceeds would be distributed to tracks as purses. 230 ILCS 5/54.5(b)(1), App., *infra*, 57a-58a. The remaining 40% of the proceeds were to be distributed directly to the tracks as an operating subsidy. 230 ILCS 5/54.5(b)(2)(B), App., *infra*, 58a. Eleven percent of the subsidy was to go to the one downstate racetrack (Fairmount Park), which is almost 250 miles away from the nearest casino required to pay the surcharge. 230 ILCS 5/54.5(b)(2)(A), App., *infra*, 58a. The remaining 89% was to be distributed to tracks pro rata according to the proportion of wagering revenues earned on live races in Illinois in 2004 and 2005. *Id.* at 5/54.5(b)(2)(B), App. *infra*, 58a. Under this distribution scheme, the tracks that have been most successful in attracting wagering activity would receive the largest subsidies; the most successful track in Illinois (Arlington Park, near Chicago) thus would receive the largest payout.

The Act gives the racetracks complete discretion as to how the subsidy would be used in their businesses, providing only that the payments are to be used "to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvement related to live racing and the backstretch." *Ibid.* App., *infra*, 59a. Track operators therefore could use the money to finance their ordinary expenses; because the tracks were not obligated to undertake new projects or maintain pre-subsidy levels of investment or working capital in their operations, the subsidies could boost profits and go straight to the tracks' bottom lines. The Illinois Racing Board is to monitor how the funds are "distributed," but not how they are spent. 230 ILCS

5/54.5(c), App., *infra*, 57a. To assure that the entire surcharge would be used to subsidize the tracks, the Act provides that the horse racing fund is a "non-appropriated trust fund held separate and apart from State moneys." 230 ILCS 5/54.5(a), App., *infra*, 57a.

Although the Act's payment obligation terminated in May 2008, in November 2008 the Legislature re-enacted virtually identical legislation that extends the Act's surcharge for an additional three years, through 2011. The burden imposed on petitioners during that period may exceed $100 million.[3]

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[3] While the new legislation was awaiting Governor Rod Blagojevich's signature in December 2008, the United States filed a criminal complaint against Governor Blagojevich, alleging, among other things, that a potential contributor (since identified as an official of a racetrack that benefits from the Act) was pressured to make an immediate $100,000 contribution to "Friends of Blagojevich" as an apparent quid pro quo for the Governor's signing of the 2008 racetrack legislation. Crim. Compl., *United States* v. *Blagojevich*, No. 1:08-cr-1010, ¶ 68(e) & n.18 (N.D. Ill., filed Dec. 7, 2008), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01a.pdf; Tamara Audi & Douglas Belkin, *Affidavit Alleges Blagojevich Sought Racing Official's Contribution*, WALL ST. J., Dec. 24, 2008, at A7. On December 15, 2008, despite the protests of the U.S. Attorney (see Patrick Fitzgerald, Press Conference, Dec. 9, 2008 (transcript available at http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html)), Governor Blagojevich signed the new legislation. Moreover, approximately one month after Governor Blagojevich signed the 2006 Act into law, an entity associated with the Balmoral Park racetrack made a substantial contribution to Friends of Blagojevich; a Special Investigative Committee of the Illinois House found that large donations to the Governor's campaign committee were often made "shortly before or after the receipt of direct benefits by the donor or the donor's employer," an association that the committee found unlikely to be "coincidental." Illinois House of Representatives,

3. Four days after the Act became law on May 26, 2006, petitioners brought this suit in state court, challenging the Act's constitutionality.[4] Among other arguments based on state law and the U.S. Constitution, petitioners contended that the 3% surcharge was an unconstitutional taking because it forced them to subsidize their competitors and did not serve a "public use." On cross-motions for summary judgment, the trial court struck down the Act under the Illinois Constitution. App., *infra*, 34a-50a. The court enjoined the Act's enforcement, but subsequently stayed its order pending appeal. *Id.* at 53a-54a. Accordingly, petitioners continued to remit the surcharge on a daily basis for the entire two-year period the Act was in effect, in amounts ultimately exceeding $75 million. The moneys have been maintained in a protest fund, where they remain pending final resolution of this suit.

Respondents appealed directly to the Illinois Supreme Court (see Ill. Sup. Ct. R. 302(a)(1)) challenging the trial court's state-law ruling, while petitioners defended the lower court's decision and reasserted their contention that the Act violated the Takings Clause because it took funds for the support of private actors. The Illinois Supreme Court upheld the Act, reversing the trial court's state-law ruling and rejecting petitioners' federal takings argument. App., *infra*, 1a-33a.

Special Investigative Committee, Final Report 29 n.41 (Jan. 8, 2009), available at http://tinyurl.com/8of5q2. These revelations suggest that the primary purpose of the 2006 and 2008 Acts was to benefit the racetracks, not the public.

[4] Various racing interests intervened as defendants. App., *infra*, 5a.

On the takings question, the Illinois Supreme Court never reached the "public use" issue. Instead, the court declared it "well settled that the takings clause[] * * * appl[ies] only to the state's exercise of eminent domain" (App., *infra*, 21a), a principle that the court believed altogether precludes a takings challenge "to fees, whether for certain services or for licensing." *Id.* at 22a. A takings analysis therefore could not apply here, the court explained, because the Act "is in no way tied to real property" or any other "identifiable property interest." *Id.* at 23a-26a.

In reaching this conclusion, the Illinois court relied heavily on the concurring and dissenting opinions in *Eastern Enterprises*. Pointing to those opinions, the court reasoned that "a majority of the Justices [of this Court] rejected the theory that an obligation to pay money constitutes a taking." App., *infra*, 24a. See *id.* at 25a ("five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings"). The court below accordingly "conclude[d] that the surcharge at issue here is not subject to a takings challenge," reasoning that it "does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest"; "[t]he case at bar does not involve the state's exercise of its eminent domain powers, but rather involves its exercise of its taxing powers." *Id.* at 26a. The court therefore found it unnecessary to determine whether the Act failed to serve a public use or provided just compensation.

REASONS FOR GRANTING THE PETITION

On its face, the Act appears to be the paradigm of a constitutional taking. As this Court stated in *Kelo* v. *City of New London*, 545 U.S. 469, 477 (2005), a

primary goal of the Takings Clause is to ensure that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." The Clause also has as a principal purpose "prevent[ing] the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises*, 524 U.S. at 522 (plurality opinion) (quoting *Armstrong*, 364 U.S. at 49). And it is basic that a taking is likely to occur when "the cost of operating the governmental apparatus" is imposed "upon some small segment" rather than spread "throughout the society." Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 75-76 (1964). That surely is the case here: the Act takes property from a small and politically less favored group, and transfers those assets to a different and politically powerful group. The Illinois Supreme Court nevertheless held that the Act is not subject to a takings challenge *at all* for the sole reason that "regulatory actions requiring the payment of money are not takings." App., *infra*, 25a-26a.

The narrow but crucially important question posed by that holding – whether and when an exaction of money may be a taking – warrants this Court's review. Although the approach taken below finds support in the decisions of some courts, it cannot be reconciled with the holdings of others, which have recognized that money *is* property, the exaction of which is subject to the strictures of the Takings Clause. The confusion about the reach of the Takings Clause is reflected in this Court's own most recent decision on the subject, *Eastern Enterprises*; that ruling produced no majority opinion or controlling rule, an outcome that, unsurprisingly, has itself served as a source of significant disagreement and

uncertainty in the lower courts. "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law" (*Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment & dissenting in part)), and clarification by this Court is urgently needed.

The need for review is especially acute because the rule adopted below turns on an illogical distinction that encourages abuse, tempting governments to turn to expropriation of money as a means of aiding favored constituents. In the circumstances here, the forced transfer from the casinos to the racetracks of any asset other than money would be a taking. A different rule should not apply simply because the asset the casinos are forced to give the tracks is money. Even assuming that the transfer serves a public interest, "'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the charge.'" *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922). To put it plainly, "if the state believes that" the assistance provided to racetracks by the Act "is a service that should be provided, it must be willing to pay for it. There ain't no such thing as a free lunch.'" *Washington Legal Found.* v. *Legal Found. of Washington*, 271 F.3d 835, 867 (9th Cir. 2001) (Kozinski, J., dissenting), *aff'd sub nom. Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003).

A. The Lower Courts Are Divided On Whether And In What Circumstances The Exaction Of Money May Be The Subject Of A Takings Challenge.

1. At the outset, review is warranted because the lower courts are divided on whether, and in what cir-

cumstances, a state's taking of money from private persons may constitute a "taking" in the constitutional sense. The Illinois Supreme Court, of course, held as a general matter that "an obligation to pay money" cannot "constitute[] a taking." App., *infra*, at 24a. Some other courts have reached the same conclusion, recognizing a per se rule that "actions requiring the payment of money are not takings." *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001). Accord, *e.g.*, *Atlas Corp.* v. *United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property."); *BHA Investments, Inc.* v. *Idaho Alcohol Beverage Control Bd.*, 63 P.3d 474, 481 (Idaho 2003) (transfer fee does not implicate Takings Clause because it involves money); *Home Builders Ass'n of Greater Des Moines* v. *City of W. Des Moines*, 644 N.W.2d 339, 351 (Iowa 2002) ("The imposition of a tax * * * is generally considered not to constitute a Fifth Amendment taking.").

Other state courts of last resort and federal courts of appeals have disagreed, however, holding squarely that money *is* property that is subject to the strictures of the Takings Clause. The Utah Supreme Court, for example, applied the Clause to hold unconstitutional a state statute that assigned to Utah fifty per cent of the value of punitive damages awards returned in the State. *Smith* v. *Price Dev. Co.*, 125 P.3d 945, 947-948 (Utah 2005). That court had no difficulty concluding that, "[b]ecause taking the [plaintiffs'] money denied them the use of that money, it constituted a taking for which just compensation is constitutionally required." *Id.* at 953.[5]

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[5] The Utah court held the statute violated both the federal and state constitutions, explaining that "[t]he Fifth Amendment

Yet in the relevant respects, the situation before the Utah Supreme Court cannot be distinguished from the one here: the State was attempting to assign to itself a specified portion of an element of the plaintiffs' income; that element of income was in no sense "tied to real property" (App., *infra*, 23a); and the State's action was not an "exercise of eminent domain," which the court below regarded as the essential touchstone of a taking. *Id.* at 21a. The Illinois Supreme Court's holding that money cannot be "taken" is thus squarely inconsistent with *Smith*.

Similarly, the Colorado Supreme Court held that a statute requiring litigants to pay one-third of any exemplary damages award to the State "effectuate[d] a forced taking of the judgment creditor's property interest." *Kirk* v. *The Denver Publ'g Co.*, 818 P.2d 262, 264 (Colo. 1991).[6] The court explained that "[o]ur conclusion derives from the nature of an exemplary damages award as a private property right, the confiscatory character of the 'taking' mandated by the statute, and the manifest absence of a reasonable nexus between the statutory taking of one-third of the exemplary damages award and the cost of any governmental services [to the plaintiff]." *Id.* at 265. In particular, the court noted that "the taking of a money judgment from the judgment creditor is substantially equivalent to the taking of money itself." *Id.* at 269. Accordingly, the court held, the State's

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analysis is virtually identical" to that under Utah takings law. 125 P.2d at 949.

[6] Like the Utah Supreme Court, the Colorado Supreme Court found the challenged state law violated both the federal and state constitutions. See 818 P.2d at 265. The court's takings analysis relied entirely on decisions of this Court. See *id.* at 268-272.

taking of the funds "has the effect of forcing a select group of citizens – persons who obtain a judgment for exemplary damages and are successful in collecting on the judgment – to bear a disproportionate burden of funding the operations of state government, which, 'in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 271-272 (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980)). Again, this holding directly conflicts with the ruling below.

And in somewhat different factual circumstances, the Fifth Circuit found a taking in a state-law requirement that insurers support a workers' compensation fund according to a formula that looked to the insurers' volume of business written in prior years. *United States Fidelity & Guar. Co.* v. *McKeithen*, 226 F.3d 412, 420 (2000). The court held that this burden "amounts to a transfer of plaintiffs' assets to the state or to third parties for public use." *Id.* at 417. Pointing to the state law's effect of "'singl[ing] out certain [parties] to bear a burden that is substantial in amount," the law's significant retroactive effect, and its lack of relation to "'any commitment that the parties made or injury they caused,'" the court held that this required payment constituted a taking. *Id.* at 419 (quoting *Eastern Enterprises*, 524 U.S. at 537 (plurality opinion)). This holding, too, cannot be reconciled with the Illinois Supreme Court's ruling that "regulatory actions requiring the payment of money are not takings." App., *infra*, 25a.[7]

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[7] See also *In re Twin City Fire Ins. Co.*, 609 A.2d 1248, 1262 (N.J. 1992) (a regulation that interferes with "only the profits of a business enterprise" implicates the Takings Clause).

Moreover, the Illinois Supreme Court's declaration that the Takings Clause "appl[ies] only to the state's exercise of eminent domain and not to its power of taxation" (App., *infra*, 21a), cannot be squared with the decisions of other state supreme courts that fees, assessments, and exactions imposed as a condition for obtaining permits necessary for the development of property may violate the Fifth Amendment. These decisions turned expressly on the conclusion that the required payment of money may work a taking of property. The Texas Supreme Court, for example, held that the requirement that abutting streets be improved as a condition for the development of property could constitute a taking, explaining that such a requirement "is in no sense a use restriction; it is much closer to a required dedication of property – *that being the money to pay for the required improvement.*" *Town of Flower Mound* v. *Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004) (emphasis added). The court therefore held that monetary "exactions" are to be treated the same as "dedications [of real property to public use] in determining whether there has been a taking." *Ibid.* Other courts have reached the same conclusion. See, *e.g.*, *Ehrlich* v. *Culver City*, 911 P.2d 429, 447 (Cal. 1996) ("when * * * a government imposes special, discretionary permit conditions on development," the Takings Clause applies no matter "whether they consist of possessory dedications or monetary exactions").[8]

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[8] See also *Home Builders Ass'n* v. *City of Beavercreek*, 729 N.E.2d 349, 354-58 (Ohio 2000) (applying takings analysis to impact fee); *Trimen Dev. Co.* v. *King County*, 877 P.2d 187, 189-190 (Wash. 1994) (park development fees reviewed under Takings Clause). Other courts, however, have reached the opposite

2. The need for this Court to resolve the conflict and clarify this area of the law is especially sharp because much of the uncertainty can be traced to the Court's own fractured decision in *Eastern Enterprises*, the most recent case in which it addressed whether the required payment of money may constitute a taking. There, a four-Justice plurality concluded that, given the enormous burden imposed upon the plaintiff by the governmentally mandated funding of health care benefits, the required payment "effect[ed] an unconstitutional taking." 524 U.S. at 504 (plurality opinion). The four dissenters disagreed, rejecting the possibility that "an ordinary liability to pay money" could constitute a taking. *Id.* at 554 (Breyer, J., dissenting). The decisive vote was cast by Justice Kennedy, who rejected the plurality's takings analysis because the challenged law did "not operate upon or alter any identified property interest, and [wa]s not applicable to or measured by a property interest" (*id.* at 540 (opinion of Kennedy, J.)); he would have invalidated the law on due process grounds. See *id.* at 547-550. Because the plurality and Justice Kennedy did not agree on the source of the governing requirement, *Eastern Enterprises* does not state a clear constitutional rule.

The lower courts have not been uniform in their reading of *Eastern Enterprises*. Some courts of appeals have aggregated the votes of the four dissenters and Justice Kennedy to conclude that "five justices * * * agreed that legally required actions requir-

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conclusion. See *Home Builders Ass'n* v. *City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (no taking occurred because permitting condition sought "to impose a fee"); *McCarthy* v. *City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (Takings Clause does not apply to ordinance "conditioning certain land uses on payment of a fee").

ing the payment of money are not takings" and that "we are obligated to follow the views of that majority." *Commonwealth Edison Co.* v. *United States*, 271 F.3d at 1339. See *Parella* v. *Retirement Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (following the "majority" of Justices in *Eastern Enterprises* and holding that Takings Clause did not apply because the case did "not involve tangible personal property or real property"); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) ("Five Justices * * * rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking."). The court below was of that view. See App., *infra*, 25a ("five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings").

But that analysis is wrong: the Court's "settled jurisprudence" is that, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds.'" *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977)). See *Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2856 (2007). In *Eastern Enterprises*, Justice Kennedy's view was not "narrower" than that of the plurality; it was simply different from and theoretically incommensurate with that of the plurality.

Other courts of appeals have *not* read *Eastern Enterprises* to establish that monetary exactions are outside the scope of the Takings Clause. The D.C. Circuit, for one, understood the *Eastern Enterprises*

plurality to have "applied settled takings principles" and expressed "doubt" that the dissent could have changed the law "given that dissenting votes have no precedential authority." *Ass'n of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1254 n. 5 (D.C. Cir. 1998). See also *A.T. Massey Coal Co.* v. *Massanari*, 305 F.3d 226, 237 (4th Cir. 2002) (*Eastern Enterprises* states governing rule only in a case that "with respect to every critical factor[] is substantially identical"); *Franklin County Convention Facilities Auth.* v. *Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("*Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court.").

Similarly, the Fifth Circuit, believing that "Justice Kennedy's specific dispute with the rest of the [*Eastern Enterprises*] majority rested on the extent to which a regulatory taking must refer to an identifiable property interest or fund," found that disagreement "muted" when the court was confronted with a monetary exaction that was tied to a fund of benefits paid each year. *United States Fid. & Guar.*, 226 F.3d at 420. The Fifth Circuit proceeded to hold that the imposition of monetary liability in that case *did* effect a taking, a ruling that the court of appeals believed to be *supported* by *Eastern Enterprises*. *Ibid.*

The Court should resolve this disagreement about the meaning of a significant precedent. This case presents an ideal vehicle for doing so. The takings issue is the only one presented here; unlike in *Eastern Enterprises*, petitioners in this case do not offer alternative bases for disposition of the constitutional challenge. There also are no distracting factual complications here; the petition presents the purely legal question of whether the court below

erred in holding that "a takings analysis is not applicable to plaintiffs' claims" because the property taken was money. App., *infra*, 26a.

Moreover, as we explain in more detail below, because the Act requires the daily payment of amounts drawn from a specified corpus of gross receipts, consideration of this case would allow the Court to address the ramifications of Justice Kennedy's observation that the statute challenged in *Eastern Enterprises* did "not operate upon or alter an identified property interest, and [was] not applicable to or measured by a property interest." 524 U.S. at 540 (opinion of Kennedy, J.). See also *id.* at 541, 543, 544. The specified receipts that are expropriated by the Act, unlike the payments at issue in *Eastern Enterprises*, have many of the characteristics of a discrete fund or account. Review of the decision below therefore would give the Court the opportunity to resolve the significant and recurring question posed by Justice Kennedy's observation: how to determine when a state law should be understood to "target[] a specific property interest" or to "depend[] upon * * * particular property for the operation of its statutory mechanisms" so as to trigger application of the Takings Clause. *Id.* at 543.

B. The Expropriation Of Money May Give Rise To A Takings Challenge.

Review also is warranted because the Illinois Supreme Court's per se rule that money cannot be the subject of a taking is indefensible. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use without just

compensation." U.S. Const., amend. V.[9] As Judge Kozinski put it in a dissenting opinion whose reasoning subsequently was embraced by this Court, "[m]oney *is* property," and there is "no logical explanation for treating it differently" from other assets for takings purposes. *Washington Legal Found.*, 271 F.3d at 866 (Kozinski, J., dissenting) (emphasis in original). The Illinois Supreme Court's contrary ruling departs from the theory and history of the Takings Clause, and rests on a distinction that is logically insupportable.

1. This Court has held that money may be the subject of a taking.

To begin with, the central aspect of the Illinois Supreme Court's analysis is demonstrably wrong. That court regarded it as "well settled that the takings clause[] of the federal * * * constitution[] appl[ies] only to the state's exercise of eminent domain," adding that the Act cannot effect a taking because it "does not involve an interest in physical or intellectual property" or "operate upon or alter an identifiable property interest." App., *infra*, 21a, 26a. This analysis is incorrect: the Court has recognized in a range of contexts that the exaction of money may constitute a taking.

In particular, the Court has held that interest earned on principal – unquestionably a monetary asset – was "taken" in a constitutional sense. In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), the Court struck down a Florida statute that authorized a county court to confiscate

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[9] "The Fifth Amendment[] [is] made applicable to the States through the Fourteenth Amendment." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 163 (1998).

interest earned on funds held by the court during pendency of an interpleader action. Because the "interest was not a fee for services," its taking was "a forced contribution to general government revenues." *Id.* at 162, 163. The Court did not find it material that the taking involved money, explaining that the county's "appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property" in *United States* v. *Causby*, 328 U.S. 256 (1946), where the government took air rights over a farm. *Webb's Fabulous Pharmacies*, 449 U.S. at 163-164. A taking occurred, the Court held, because "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. Expropriating the "value of the use of the fund" was "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Ibid.*

Similarly, the Court held that a taking was effected by the requirement of an Interest on Lawyers Trust Account (IOLTA) program that interest earned on client funds be paid to foundations that provide legal services. *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998). Finding that "the principal held in IOLTA trust accounts is the 'private property' of the client," the Court held that "'a State, by *ipse dixit*, may not transform private property into public property without compensation.'" *Id.* at 164, 167 (quoting *Webb's*, 449 U.S. at 164). See *id.* at 170, 172.[10] The Court subsequently built on that conclu-

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[10] The supposed "government-created" value of the interest did not negate the applicability of the Takings Clause. Merely because the State "'mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership

sion in *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216 (2003), finding that interest earned on IOLTA accounts "was taken for a public purpose when it was ultimately turned over to the Foundation" and holding that "the transfer of the interest" was "akin to the occupation of a small amount of rooftop space in [*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." 538 U.S. at 235.

These holdings necessarily accept that money is constitutionally equivalent for takings purposes to land or other forms of physical property. And the Court, in fact, has never suggested otherwise. To the contrary, the Court has regarded it as obvious that the expropriation of particular forms of revenue is not exempt from takings scrutiny; thus, "[t]he government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amounts collected." *Phillips*, 524 U.S. at 170. Indeed, even the *Eastern Enterprises* dissenters recognized decisions in which, as they characterized it, the Court "has arguably acted *as if* the Takings Clause might apply to the creation of a general liability." 524 U.S. at 555 (Breyer, J., dissenting).[11]

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of the interest.'" *Phillips*, 524 U.S. at 171 (quoting *Webb's*, 449 U.S. at 162).

[11] Historically, the Court has recognized in a variety of settings that monetary exactions may be takings. See, *e.g.*, *Norwood* v. *Baker*, 172 U.S. 269, 279 (1898) ("the cost of a public improvement in substantial excess of the special benefits accruing" to a person constituted "a taking, under the guise of taxation, of private property for public use without compensation"); *Houck* v. *Little River Drainage Distrib.*, 239 U.S. 254, 275 (1915) (taking may arise where "the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property"). A taking may occur in the taxation context when

2. The Takings Clause applies to all forms of property.

These decisions are of a piece with the broader premise of the Court's takings holdings, derived from the history and theory of the Takings Clause, that *all* forms of property are protected by the Clause. Notwithstanding the Illinois Supreme Court's focus on eminent domain and real property, the Court has applied takings analysis to personal property of all kinds. See, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51 (1979) (bird feathers); *James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924) (alcoholic beverages). And the Takings Clause consistently has been "extend[ed] to tangibles and intangibles alike" (*Cincinnati* v. *Louisville & Nashville R.R.*, 223 U.S. 390, 400 (1912)), protecting such assets as intellectual property (*Ruckleshaus* v. *Monsanto*, 467 U.S. 986, 1002 (1984)); customer lists, trade routes, goodwill, and other elements of "going concern value" (*Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 9-11 (1949)); liens and mortgages (*Armstrong*, 364 U.S. at 40, 48; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 596-602 (1935); *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 75-78 (1982)); contracts (*Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *Long Island Water Supply Co.* v. *City of Brooklyn*, 166 U.S. 685, 690 (1897)); and even an option to *renew* a contract.

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the taxing statute is "so arbitrary" as to necessitate the conclusion that it is "not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916). See *Nichols* v. *Coolidge*, 274 U.S. 531, 542-543 (1927) (inclusion of value of pre-death property transfers in taxable estate was "so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment").

United States v. Petty Motor Co., 327 U.S. 372, 381 (1946).

Against this background, there is no justification for the categorical rule, announced by the court below, that "an obligation to pay money" is outside the scope of the Takings Clause. App., *infra*, 24a. As Judge Kozinski put it, there surely is no denying that, in every ordinary sense of the word, "[m]oney *is* property."[12] *Washington Legal Found.*, 271 F.3d at 867. After all, property – or the "thing" that prior to a taking "was understood to be under private ownership" – encompasses "any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned." Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1184 n. 37 (1967) (cited in *Loretto*, 458 U.S. at 427 n.5). Money comes with the same set of rights that attach to land or personal property: the "right to possess, use and dispose of it." *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). At the very least then, property interests inhere in "actual ownership of real estate, chattels, *or money*." *Bd. of Regents* v. *Roth*, 408 U.S. 564, 572 (1972) (emphasis added).

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[12] *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), is not to the contrary. There, the deduction of a fee from a damages award was held not to be a taking because it was "reimbursement of the cost of" the tribunal's services. *Id.* at 63. The Court explained that "money is fungible" to emphasize that, *if* the government *may* charge a fee, it makes no difference whether "the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately." *Id.* at 62 n.9. Nowhere did "the Supreme Court suggest that the government's obligation to pay compensation is eliminated because it takes money rather than real or personal property." *Washington Legal Found.*, 271 F.3d at 867 (Kozinski, J., dissenting).

And in all other contexts, the Constitution protects money, just as (and in just the same way as) it protects other forms of property. "The assets of a business * * * unquestionably are property" for due process purposes. *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). Due process shields against excessive punitive damage awards that take "'property' from the defendant" – that is, its money. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 349, 359 (2007). Garnishment of wages likewise triggers Fourteenth Amendment procedural protections. *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337, 341-342 (1969). Nothing in the text or history of the Constitution justifies treating money any differently for purposes of the Takings Clause.[13]

Indeed, excluding money from the protection of the Takings Clause would lead to a host of logical conundrums. There is no doubt that a taking would occur if Illinois conveyed $75 million worth of petitioners' real estate, fixtures, furnishings, trademarks, restaurant cutlery, ornamental fish, or common stock to the racetracks; it is not at all apparent

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[13] It therefore is no surprise that the fundamental conceptions of property that informed the Framers of the Taking Clause support the treatment of money as property. See John Locke, SECOND TREATISE OF CIVIL GOVERNMENT, Ch. 5, § 36 (1690) ("[t]he measure of property nature has well set by the extent of men's labour"); 1 Wm. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1765) (property "consists in the free use, enjoyment, and disposal of *all his acquisitions*, without any control or diminution, save by the laws of the land"). James Madison – the driving force behind the Takings Clause – similarly believed that "a man's land, or merchandize, *or money* is called his property." James Madison, ESSAY ON PROPERTY ch. 16 (Mar. 29, 1792) (emphasis added).

why a taking does not occur when Illinois instead conveys an equivalent amount of petitioners' cash, an exaction that has precisely the same practical impact both on petitioners and on the tracks. Moreover, money "is the currency with which government pays for property interests under the Takings Clause." John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1038 (2003). There accordingly would be little purpose in the Clause "if the government could take a person's land by eminent domain, compensate the owner, and then reclaim the money without constitutional limitation." *Ibid.* And that is especially so because we "no longer count our wealth by looking first to our social property of land, farms, buildings"; our chief "means of support consist of legal property: stocks, bonds, pensions." Bruce Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 166 (1977).

Thus, as Judge Kozinski explained in voicing his disagreement with the notion "that money is different [from other property] because it is fungible":

> If the government comes into your house and takes [a] Renoir off the wall, you will suffer a compensable loss. You suffer the same loss if the government comes into your house and seizes an equal value in cash—the two events are indistinguishable for purposes of takings analysis. * * * For purposes of the takings clause then, real and personal property are reduced to their cash equivalents.

Washington Legal Found., 271 F.3d at 866 (Kozinski, J., dissenting)). That makes it "peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property"; the Takings Clause does not

cease to apply because the "property in question is money." *Ibid.*

3. Takings analysis may not be avoided by characterizing the Act as a tax.

For several reasons, it is no answer to this point to suggest, as did the court below, that a taking did not occur because the Takings Clause does not apply "to the state's power of taxation" and the Act involved an "exercise of [the State's] taxing powers." App., *infra*, 21a, 26a. *First*, the Act is by no means a tax of the ordinary sort: a law that transfers A's assets directly to B is not "'a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" *United States* v. *Reorganized CF&I Fabricators*, 518 U.S. 213, 224 (1996). The Act commits some (but not all) of the licensed casinos in Illinois to support five racetracks, not governmental operations or the public in general. This perhaps explains why the Illinois legislature labeled the taking a "surcharge," deemed it a "condition of licensure," and cordoned off the provision in a statutory section regarding "Owners Licenses," separate from the "Wagering tax" sections. Compare 230 ILCS 10/7(a) with 230 ILCS 10/13.

Second, the taking here is much more closely akin to one directed at a defined fund of assets, such as the IOLTA account in *Phillips*, than it is to the imposition of a general obligation like the one imposed by the statute challenged in *Eastern Enterprises* or an ordinary income tax. In *Eastern Enterprises*, "the Federal Government ha[d] not specified the assets that Eastern [had to] use to satisfy its obligation" (524 U.S. at 529 (plurality opinion)); the challenged statute was "indifferent as to how the regulated entity elect[ed] to comply or the property it

use[d] to do so." *Id.* at 540 (opinion of Kennedy, J.). See *id.* at 555 (Breyer, J., dissenting). The Illinois Act, in contrast, specifies the source and nature of the assets that must be paid over: petitioners must make *daily* payments of a specified portion of the prior day's adjusted gross receipts for a two-year period. See App., *infra*, 60a. This obligation "operate[s] upon * * * an identified property interest" and is "measured by [that] property interest." *Id.* at 540 (Kennedy, J., concurring).

Third, and in any event, "[t]axation is not immune from the strictures of the Takings Clause." Calvin Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 88 (1996). More than one commentator has recognized that the taxing power "is not merely similar to eminent domain; it is the same, as far as the power itself goes." William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 571 (1972).[14] Thus, as one court put it early on, "[t]he right of taxation and the right of eminent domain rest substantially on the same foundation." *Griffin* v. *Mayor of Brooklyn*, 4 N.Y. 419, 422 (1851). But "most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment." Sax, *supra*, 74 YALE L.J. at 75-76. Such taxes "couple[] burdens on

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[14] See, e.g., Richard Epstein, TAKINGS 283-305 (1985) (rejecting a strict divide between taxing and taking); Walter Blum & Harry Kalven, Jr., THE ANATOMY OF JUSTICE IN TAXATION 5 (1973) ("Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to government in order to satisfy his tax obligation[.]").

a broad swath of the population with benefits from the use of tax revenues sprinkled over a similarly large portion of society." Eric Kades, *Drawing the Line Between Taxes and Takings*, 97 NW. U. L. REV. 189, 203 (2002). Taxes therefore "usually have the kind of general applicability that mutes the concerns behind takings jurisprudence. The broader the reach of a law, the less likely it is that a powerless segment of society is being unfairly singled out to bear a burden that society as a whole should bear." *Unity*, 178 F.3d at 676.

The Act, however, is of an entirely different character. It has nothing in common with the myriad income, property, sales, consumption, and corporate taxes routinely imposed by government. The surcharge imposed by the Act is not a special assessment or a general tax for which petitioners receive something in return, either directly (like a fee for road construction that may increase the number of casino visitors) or indirectly (like a tax supporting police services or the other general benefits of living in a civilized society). Rather, petitioners pay a portion of their revenues directly to a small and identified group of their competitors, to be used by those competitors for essentially any purpose and without government supervision, even though petitioners do not obtain *any* "average reciprocity of advantage." *Pennsylvania Coal Co.*, 260 U.S. at 415.

In fact, as petitioners argued below, the Act's award of benefits is so skewed to the advantage of private interests that it does not satisfy the Fifth Amendment's public use requirement: "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*" (*Kelo*, 545 U.S. at 477), and there is every reason to

believe that the Act's "actual purpose was to bestow a private benefit." *Id.* at 478.[15] These oppressive characteristics of the legislation, which make clear that the Act's burdens are not "shared among a community * * * for [its] collective benefit" (Fee, *supra*, 76 S. CAL. L. REV. at 1040), "implicate[] fundamental principles of fairness underlying the Takings Clause" and establish that the Act is a taking rather than a tax. *Eastern Enterprises*, 524 U.S. at 537 (plurality opinion).

Even if the Court accepts at face value the legislative declaration that the Act served a public purpose by "benefit[ing] * * * Illinois farmers, breeders, and fans of horseracing" (App., *infra*, 57a), it forces four casinos "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The Court has long recognized that the Takings Clause "prevents the public from loading upon one individual

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[15] The Act lacks the characteristics that might give it a clear public purpose: it is a naked transfer of assets from petitioners to known entities, as opposed to one where "the identity of *B* was unknown" (*Kelo*, 545 U.S. at 478 n.6); and that transfer is made without strings, rather than as part of a "carefully formulated" and "comprehensive" plan. *Id.* at 483-484. As the Court noted in *Kelo*, such "a one-to-one transfer of property, executed outside the confines of an integrated development plan," is "an unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. See *id.* at 487 n.17 ("Courts have viewed such aberrations with a skeptical eye."); *id.* at 493 (Kennedy, J., concurring) ("there may be categories of cases in which transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose"). For these reasons, the Act cannot not survive "public use" scrutiny.

more than his just share of the burdens of government." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893). "A tax singling out one or a handful of citizens offends" that oft-repeated constitutional principle. Kades, *supra*, 97 NW. U. L. REV. at 190. But that is just what the Act is designed to do.

4. The question presented is one of great importance.

Finally, review is imperative because the issues presented here are potentially recurring ones of great practical importance. As noted above, the question whether money may be "taken" in a constitutional sense arises repeatedly in a wide range of contexts. Often, as in this case and *Eastern Enterprises*, enormous sums are at stake in such disputes. And the problem has particular currency at times of economic distress, as governments at all levels seek additional and alternative sources of revenue – for themselves and for particular private parties – to relieve serious budgetary constraints. If the decision below upholding the Act is correct, state and local governments will be emboldened to enact legislation that takes money from successful businesses and awards it to less successful (or more favored) competitors, under the guise of advancing the local economy. It is hardly farfetched, for example, to envision local governments imposing such charges on "big box" stores to be distributed as subsidies to local retailers, or on chain drug stores to be distributed to local pharmacies, or in a host of similar circumstances.

As the Texas Supreme Court has noted, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a ma-

jority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound*, 135 S.W.3d at 641. And this Court has long recognized the legislative temptation to enact laws "that take[] property from A, and gives it to B.'" *Kelo*, 545 U.S. at 478 n.5 (quoting *Calder* v. *Bull*, 3 Dall. 386, 388 (1798)). That temptation to impose special burdens on disfavored groups, and to do so for the benefit of the politically powerful, is made more difficult to resist if expropriations of money are not constrained at all by the Takings Clause. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309 (1990) ("[a] central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities").

As this case demonstrates, these dangers are not theoretical. Federal officials have alleged that the Governor of Illinois pressed a racetrack operative for a substantial campaign contribution as a quid pro quo for effectively extending the Act for an additional three years; it appears that other racing officials donated to the Governor's campaign committee shortly after he signed the initial Act into law. See note 5, *supra*. These allegations support the conclusion, already evident from the way in which the Act was structured, that the legislation was intended to further the tracks' private interests, at the expense of their competitors. But whatever the ultimate outcome of the federal corruption case against the Governor, the allegations against him show the ease with which government can force disfavored parties "alone to bear public burdens." *Armstrong*, 364 U.S. at 49. Indeed, wholly apart from the allegations of corruption, this case illustrates how a rule excluding money from the protections of the Takings Clause

encourages subversion of a core principle of that Clause: that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Kelo*, 545 U.S. at 478 n.5. This Court has recognized its special obligation to guard against such abuses. See *Id.* at 487 n.18. Review of the decision below accordingly is in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2009

APPENDICES

APPENDIX A

Docket Nos. 104586, 104587, 104590 cons.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

EMPRESS CASINO JOLIET CORPORATION et al.,

Appellees,

v.

ALEXI GIANNOULIAS, Treasurer of the State of Illinois, et al.,

Appellants.

Opinion filed June 5, 2008.

JUSTICE BURKE delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

OPINION

In this case, we are asked to determine the constitutionality of Public Act 94–804 (the Act), which imposed, for a two-year period beginning on the effective date of the amendatory Act, a 3% surcharge on the four riverboat casinos in Illinois that had adjusted gross receipts (AGR) of over $200 million in the calendar year 2004. The remaining five riverboat casinos, all of which had AGRs below $200 million, were not subject to the surcharge. The Act provided that the proceeds of the surcharge were to be

distributed to the five horse racing tracks in Illinois. For the reasons that follow, we hold that Public Act 94–804 withstands the constitutional challenges raised, in the circuit court of Will County, by the four casinos subject to the tax.

BACKGROUND

The Illinois legislature authorized riverboat casinos in 1990 under the Riverboat Gambling Act (230 ILCS 10/1 *et seq.* (West 2004)). There are 10 licenses available for riverboats in Illinois: nine are in use, the tenth is in litigation. The nine riverboat casinos are located in Alton, Aurora, East Dubuque, East St. Louis, Elgin, Joliet, Metropolis, Peoria, and Rock Island. Four casinos have AGRS over $200 million–Empress Casino Joliet, Harrah's Casino Cruises Joliet, Hollywood Casino-Aurora, and Elgin Riverboat Resort-Riverboat Casino. There are five horse racing tracks with live racing in Illinois, located in Arlington Heights, Crete, Collinsville, Stickney/Cicero, and Melrose Park.

In May 2006, the General Assembly passed Public Act 94–804. The Act requires those casinos with AGRs over $200 million to daily contribute 3% of their AGR into the Horse Racing Equity Trust Fund. The Act provides that the monies (along with interest) shall be distributed, within 10 days of deposit into the Fund, as follows: 60% to organization licensees to be distributed at their race meetings as purses and 40% to racetracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." Distribution of the above-described 40% takes place as follows: 11% to Fairmount Park Racetrack and 89% to the other four

tracks pro rata based on the aggregate proportion of total handle[1] for calendar years 2004 and 2005 from wagering on live races conducted in Illinois.

In enacting Public Act 94–804, the legislature made the following findings:

> "(1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has deceased by 42% from $835 million to $482 million.
>
> (2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more th[a]n 46% from 3,529 to 1,891.
>
> (3) That the decline of the Illinois horseracing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

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[1] The "handle" is the amount of money wagered in the parimutuel pool or the total amount of bets taken.

(4) That Illinois agriculture and other businesses that support and supply the horse racing industry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.

(5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit that important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gaming has had on Illinois horseracing." Pub. Act 94–804, § 1, eff. May 26, 2006.

Plaintiffs, Empress Casino Joliet Corporation, Des Plaines Development Limited Partnership d/b/a Harrah's Casino Cruises Joliet, Hollywood Casino-Aurora, Inc., and Elgin Riverboat Resort-Riverboat Casino d/b/a Grand Victoria Casino, filed a four-count complaint for declaratory judgment and injunctive relief against defendants, Alexi Giannoulias as the Treasurer of the State of Illinois[2] and the Illinois Racing Board.

In count I, plaintiffs alleged that the Act violates the takings clause (article I, section 15) and the due process clause (article I, section 2) of the Illinois Constitution, as well as the due process clause of the United States Constitution, because the surcharge is

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[2] Judy Barr Topinka was originally named. Giannoulias was substituted as defendant when he took office.

used for a primarily private use. In count II, plaintiffs alleged that the Act violates article VIII, section 1 (the so-called public funds clause), of the Illinois Constitution because the surcharge was imposed for a private purpose only. In count III, plaintiffs alleged that the Act violates the uniformity clause (article IX, section 2) of the Illinois Constitution as well as the equal protection clauses of the Illinois and federal constitutions. Lastly, in count IV, plaintiffs alleged that the Act violates the special legislation provision (article IV, section 13) of the Illinois Constitution because the surcharge confers a benefit on a particular private group without a reasonable basis, rather than promoting the general welfare of the state. Plaintiffs sought a declaration that the Act is unconstitutional and a permanent injunction against the imposition or collection of the surcharge. Plaintiffs have paid the surcharge under protest pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/2a (West 2006)).

Balmoral Park Racing Club, Inc., Hawthorne Race Course, Inc., Maywood Park Trotting Association, the National Jockey Club, and the Illinois Harness Horsemen's Association were granted leave to intervene on behalf of defendants.

The parties eventually filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of plaintiffs, holding that the Act is invalid because it violates the uniformity clause of the Illinois Constitution. The circuit court found there was no real and substantial difference between the four casinos taxed and the five casinos not taxed and that no reasonable relationship had been provided for the classification. In so finding, the circuit court rejected defendants' contention that

the classification for the taxed casinos was reasonable since those casinos making over $200 million AGR were better able to absorb the surcharge. The court found that the ability-to-absorb justification was insufficient.

Because the circuit court invalidated an Illinois statute, defendants and intervenors appeal directly to this court. *See* 210 Ill. 2d R. 302(a)(1).

ANALYSIS

Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2000). We review the circuit court's grant of summary judgment *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003).

We also review the constitutionality of a statute *de novo*. *Arangold Corp.*, 204 Ill. 2d at 146. "Statutes bear a presumption of constitutionality, and broad latitude is afforded to legislative classifications for taxing purposes." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 250 (1996). The party challenging a nonproperty tax classification carries the burden of rebutting that presumption and "clearly establishing" the Act's unconstitutionality by showing that it "is arbitrary or unreasonable." *Allegro Services, Ltd.*, 172 Ill. 2d at 250-51. We have a duty to uphold a statute as constitutional whenever reasonably possible. *Arangold Corp.*, 204 Ill. 2d at 146.

I. Uniformity Challenge

A. *Standards for a Uniformity Challenge*

Article IX, section 2, of the Illinois Constitution provides:

> "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX, §2.

The standards for evaluating a challenge to a statute based on the uniformity clause are well established:

> "To survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp.*, 204 Ill. 2d at 153.

Relying on language from this court's decision in *Arangold Corp.*, plaintiffs initially contend that, to satisfy the second prong of the uniformity test, the tax (1) must be designed to remedy a special burden the class in question has imposed on the state or (2) must confer a specific benefit on the class taxed.

In *Arangold Corp.*, wholesale distributors of cigars and chewing tobacco challenged a tax on their products to fund long-term care for skilled and intermediate nursing facilities, particularly for those unable to afford the cost of such care, as a violation of due process and the uniformity clause. We rejected both challenges. With respect to the uniform-

ity challenge, we concluded that the plaintiffs failed to satisfy their burden to show that the asserted justification for the classification was unsupported by the facts. *Arangold Corp.*, 204 Ill. 2d at 157.

Plaintiffs maintain that, while the tax was found reasonable in *Arangold Corp.*, we must reach an opposite result here. Plaintiffs argue that the critical difference between the instant case and *Arangold Corp.* is that the General Assembly here could not rationally believe the "responsibility to pay" for subsidizing the horse racing industry "rests with the State." Moreover, plaintiffs contend that whatever harm the casinos have caused to the horse racing industry, it cannot possibly be deemed a burden imposed by the casinos on the state since the state has no responsibility to support the horse racing industry.

Plaintiffs' contention that the tax levied against them must be designed to remedy a special burden the casinos imposed on the state in order for the classification to bear a reasonable relationship to the statute is incorrect. Plaintiffs take comments this court made in *Arangold Corp.* in connection with our due process discussion and attempt to interject them into the uniformity analysis. In *Arangold Corp.*, when discussing the second prong of a due process challenge, *i.e.*, whether the statute bears a reasonable relationship to the interest intended to be protected, we noted that the General Assembly could have believed the responsibility to assist the poor with long-term care rests with the state, that persons often need long-term care due to their use of tobacco products, and thus, distributors of tobacco products should bear some measure of the costs through taxation. From this comment, plaintiffs attempt to en-

graft onto the second prong of the uniformity analysis a requirement that the tax must be designed to remedy some burden the taxed class has imposed on the state in order to satisfy that prong. We reject this argument.

When discussing the plaintiffs' challenge under the uniformity clause in *Arangold Corp.*, this court never held that, in order to bear a reasonable relationship to the object of the legislation, the tax must be designed to remedy some burden the taxed class imposed on the state. The language in *Arangold Corp.* on which plaintiffs rely was never part of the standard for assessing a uniformity challenge. Rather, it was one factor we considered when, in relation to the plaintiffs' due process challenge, we determined whether the statute at issue in *Arangold Corp.* bore a reasonable relationship to the interest sought to be protected. Accordingly, we find no support for plaintiffs' claims that a tax will violate the uniformity clause unless it is designed to remedy a special burden of the state.

Plaintiffs' alternative argument is that the tax at issue here may be upheld only if the casinos stand to benefit from the tax in some special way. Because it is undisputed the casinos will not benefit from the subsidy, plaintiffs maintain the surcharge is not reasonably related to the purpose of the legislation. We are unpersuaded by this argument.

We have repeatedly held that a tax may be imposed upon a class even though the class enjoys no benefit from the tax. *See, e.g., Arangold Corp.*, 204 Ill. 2d at 151 (" '[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition

to be remedied' "), quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22, 81 L. Ed. 1245, 1260, 57 S. Ct. 868, 878 (1937). Accordingly, we reject plaintiffs' attempts to alter the standards for analyzing uniformity clause challenges. We reiterate: "To survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp.*, 204 Ill. 2d at 153.

In relation to the first prong–whether a real and substantial difference exists between those taxed and those not taxed–it has been recognized that "[t]he party attacking a tax classification is not required to negate every conceivable basis that might support it." *Arangold Corp.*, 204 Ill. 2d at 153. Rather, once the plaintiff establishes a good-faith uniformity challenge, the taxing body must produce a justification for the classification. *Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 248 (1992). It then becomes the plaintiff's burden to persuade the court that the justification is insufficient, either as a matter of law or as unsupported by the facts. *Geja's Cafe*, 153 Ill. 2d at 248-29. If the plaintiff cannot do so, then, as a matter of law, judgment is proper for the taxing body. *Geja's Cafe*, 153 Ill. 2d at 249.

We further explained the nature of the uniformity clause in *Arangold Corp.*:

> "The uniformity clause was intended to be a broader limitation on legislative power to classify for nonproperty tax purposes than the limitation of the equal protection clause

> (*Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill. 2d 454, 469 (1987)) and was meant to insure that taxpayers would receive added protection in the state constitution based upon a standard of reasonableness that is more rigorous than that contained in the federal constitution (*Milwaukee Safeguard*, 179 Ill. 2d at 102). * * * Despite the more stringent standard under the uniformity clause, the scope of a court's inquiry is 'relatively narrow.' *Allegro*, 172 Ill. 2d at 250. '[I]n a uniformity clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers.' *Geja's Cafe*, 153 Ill. 2d at 252." *Arangold Corp.*, 204 Ill. 2d at 153.

When a plaintiff challenges a legislative classification, he has the burden of showing the classification is arbitrary or unreasonable. *Geja's Cafe*, 153 Ill. 2d at 248. If a set of facts "can be reasonably conceived that would sustain it, the classification must be upheld." *Geja's Cafe*, 153 Ill. 2d at 248.

In the case at bar, the parties do not dispute that the Act creates two classifications: (1) all casinos and (2) casinos with an AGR over $200 million. The question before us is whether these two classifications are arbitrary or unreasonable. The circuit court found only that the AGR classification violated the uniformity clause. However, plaintiffs argue to this court that the classification relating to the casi-

nos as a whole is also invalid. We address this classification first, because if that classification fails, the AGR classification would necessarily fail as well.

B. *Casinos Classification*

Plaintiffs contend that the Act violates the uniformity clause because the General Assembly's stated reason for singling out casinos for taxation, *i.e.*, repairing damage to the horse racing industry, fails the rational basis test applied under uniformity clause analysis.

Defendants and intervenors, however, claim that the classification is reasonable and not arbitrary. They note that the object of the legislation at issue here was to reverse the decline in the horse racing industry. The legislature's justification for the surcharge, as expressly set forth by the General Assembly in the Act, was that the casinos have had a negative impact on that industry.

Since a justification has been produced, it is incumbent upon plaintiffs to establish that the justification is insufficient as a matter of law or that it is unsupported by the facts. In their attempt to do so, plaintiffs offer a report entitled "A Review of Racing in Illinois with a Comparison to National Trends in Pari-mutuel Wagering," compiled by Eugene Christiansen of Christiansen Capital Advisors, a company that performs studies of the economic, management, operation, taxation and regulation of leisure and entertainment businesses in the United States and abroad. The report purports to provide "trends in Illinois horse race wagering between 1983 and 2004, together with comparison of trends in Illinois horse racing with contemporary trends in horse racing in the United States as a whole; in States

with horse racing but no casinos; and in States with horse racing and casinos."

Christiansen concludes in this report:

> "These trends and comparisons do not support the statement that Illinois riverboat casinos were the sole, or even the main, factor in the decrease of wagering at racetracks in Illinois. * * * The decline in wagering at Illinois racetracks is principally due to off-track betting, which shifted a large amount of wagers from racetracks to OTB facilities, while increasing total State-wide wagering on horse races."

Further, Christiansen opines:

> "[L]icensed interactive betting services, unlicensed interactive betting services located in other countries, and interactive betting services licensed in other countries that accept bets from U.S. residents also contribute to the decline in live handle by shifting wagers from live and simulcast pari-mutual facilities to personal computers and interactive television. Simulcasting, off-track betting and Internet and other interactive bettor services including telephone account wagering were developments internal to the horseracing industry. They were not consequences of casino gaming, in Illinois or in the United States."

In the case at bar, the legislature has provided express findings regarding the necessity of the tax imposed on the casinos. The general rule regarding such findings has been explained:

> "Courts are not empowered to 'adjudicate' the accuracy of legislative findings. The legislative fact-finding authority is broad and should be accorded great deference by the judiciary. Therefore, to the extent the affidavits of record may have been offered to contest the wisdom of the legislative enactment, we reiterate that the legislature is not required to convince this court of the correctness of its judgment * * *. *See Bernier*, 113 Ill. 2d at 229, citing *Vance v. Bradley*, 440 U.S. 93, 111, 59 L. Ed. 2d 171, 184-85, 99 S. Ct. 939, 949-50 (1979); *see also Cutinello v. Whitley*, 161 Ill. 2d 409 (1994). Our task is limited to determining whether the challenged legislation is constitutional, and not whether it is wise." *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 389-90 (1997).

While it is clear that Christiansen holds a view different from that of the legislature as to the cause of the decline in the horse racing industry, that view does not render the legislative findings insufficient. Simply because Christiansen's report suggests that casinos are not the *sole* reason for the decline of horse racing does not mean that plaintiffs have satisfied their burden of establishing that the justification for the classification is arbitrary or unreasonable. Giving the legislative findings the deference they must be accorded (see *Best*, 179 Ill. 2d at 389-90), we conclude there is a reasonable relationship between the classification and object of the legislation.

C. *AGR Classification*

As previously noted, the circuit court in the case at bar held there was no real and substantial difference between the four casinos taxed and the five that

were not and, as a result, there was no reasonable relationship between the AGR classification and the object of the Act. Before this court, plaintiffs ask us to uphold this finding.

Defendants and intervenors, however, contend that the casinos with an AGR over $200 million can better absorb the surcharge and that this is a proper basis for distinguishing the casinos. Defendants and intervenors maintain that the circuit court's decision must be reversed because plaintiffs failed to meet their burden of demonstrating that this justification for the AGR classification is insufficient as a matter of law or unsupported by the facts.

Initially we note that one reason the circuit court ruled as it did was because it held that the General Assembly did not set forth its justification for the AGR classification within the Act itself. Defendants and intervenors contend that this was error on the circuit court's part. We agree.

Although none of the cases cited by the parties directly analyze this question, it is evident from case law that the legislature is not required to state its justification for a classification within an act. As this court has stated: "The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it." *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 490 (1954). We conclude, therefore, that the legislature is not required to provide its justification for a classification within the statute itself. The circuit court's holding to the contrary was in error.

On a related issue, plaintiffs argue that the "ability to absorb" justification fails because it is at odds with the expressly stated purpose of the Act, which is to address the harm created by casinos to horse track racing. Plaintiffs maintain that, when the legislature states its purpose within an act, a classification cannot later be upheld on other grounds. In support of this argument, plaintiffs rely on *Primeco Personal Communications, L.P. v. Illinois Commerce Comm'n*, 196 Ill. 2d 70 (2001).

In *Primeco*, a municipal infrastructure maintenance fee was imposed by certain municipalities on telecommunications retailers. The plaintiffs were wireless telecommunications retailers who argued that the fee violated the uniformity clause because the fee was intended as a means of compensating municipalities for the physical occupation of the public right-of-way by telecommunication providers. Because the plaintiffs, being wireless, did not physically occupy any public right-of-way, they argued that they should not be subject to the fee. *Primeco*, 196 Ill. 2d at 73. The defendants denied that the fee was a means of compensating municipalities for their occupation of the public right-of-way and instead argued that the fee was a means of raising revenue. The circuit court found that the object of the fee was to compensate municipalities for use of the right-of-way. Because the wireless retailers did not use these right-of-ways, the court held the classification as applied to plaintiffs was unreasonable. *Primeco*, 196 Ill. 2d at 82. We affirmed the circuit court and held there was no reasonable relationship between the classification and the object of the legislation.

Plaintiffs maintain that *Primeco* "held that when the General Assembly expressly sets forth the pur-

pose of a tax, the taxing body cannot defend against a uniformity challenge by offering a different rationale." However, this language appears nowhere in *Primeco*, nor can it be implied from other language in the opinion. *Primeco* simply does not so hold.

We find *Primeco* distinguishable for another reason. The defendants in *Primeco* were attempting to define the *purpose* of the act itself, not the justification for a classification. In the case at bar, defendants and intervenors do not assert, as plaintiffs maintain, that the *purpose* for imposing the surcharge was based on the ability to absorb. Instead, they assert that the *AGR classification* is based on the ability to absorb the costs.

Defendants have produced a justification for the classification, *i.e.*, the ability to absorb the surcharge, which the General Assembly could reasonably have concluded was a rational justification. It is therefore incumbent upon plaintiffs to show that the justification is insufficient as a matter of law or unsupported by the facts. Plaintiffs contend that the defendants' justification fails because it is not supported by the facts. Plaintiffs maintain that, if the General Assembly was concerned about a casino's ability to absorb the cost, it would have set the measuring point of the casinos' financial condition at the time the surcharge was paid, rather than the 2004 AGR. Plaintiffs assert that this retrospective view suggests the $200 million limit was arbitrarily selected to insulate the downstate casinos from the tax and was not a point at which a casino could afford to absorb the surcharge. Plaintiffs further argue that the $200 million AGR was selected by the legislature because it allowed the downstate casinos to be exempt from the tax and that exempting the downstate casinos

from the tax was the only way the legislature was able to get the Act passed.

We are unpersuaded by plaintiffs' arguments. First, plaintiffs have not shown that there is no real and substantial difference between the downstate casinos and the upstate casinos, which are the ones that have AGRs over $200 million. The fact is, however, that the downstate casinos' average intake is between $2 and $6 million per month, while the upstate casinos, located in more populated areas, have an average intake of $20 to $40 million per month. This is a substantial difference.

Moreover, plaintiffs' suggestion that a different method for determining the financial condition of the casinos for deciding whether to impose the surcharge is impractical. It would be inconceivable to measure the financial condition of the casinos at the time they were required to pay the surcharge. The Act requires the surcharge to be levied on a daily basis. It would be logistically impossible to measure the financial condition of each casino every single day. The legislature had to set some measuring point. Since the bill was introduced in 2005, the 2004 figures were the most recent financial figures and, thus, a logical choice to use as the measuring point.

Further, plaintiffs' suggestion that setting the measuring stick at $200 million was the result of a legislative compromise is not a relevant consideration. The justification itself is the critical focus. If the justification is reasonable, any further inquiry into the motives of the legislature is improper. *Donovan v. Holzman*, 8 Ill. 2d 87, 96 (1956) (court is not at liberty to inquire into the motives of the legislature). Plaintiffs' arguments fail to persuade us

that the justification for the AGR classification is not supported by the facts.

Plaintiffs further argue that mere quantitative differences in AGR between otherwise identical businesses should never be enough, alone, to justify an exemption from a fee. Plaintiffs maintain that a qualitative difference must exist between the five casinos below the $200 million threshold and the four above it, and that none exists here, because all casinos have the similar ability to incorporate the cost of the surcharge into the services they provide.

Initially, we do not accept plaintiffs' premise that all casinos are identical. While it may be true that all casinos might be able to incorporate a surcharge into their services and pass the charge along to customers, this does not mean the casinos are identical.

More fundamentally, however, we agree with defendants that the uniformity clause allows subclassifications and exclusions as long as they are reasonable. As such, quantitative differences in AGR may be sufficient to justify a classification. We have previously held that there need not be "proof of perfect rationality as to each and every taxpayer." *Arangold Corp.*, 204 Ill. 2d at 153.

We conclude that plaintiffs have failed to meet their burden of demonstrating there is no real and substantial difference between the two groups of casinos. Plaintiffs have not shown the classification is arbitrary or unreasonable. Accordingly, we conclude that the circuit court erred in holding that the Act violates the uniformity clause of the Illinois Constitution.

II. Public Use and Public Purpose

In an alternative argument in support of the circuit court's judgment, plaintiffs claim that the Act is unconstitutional because the subsidy to the horse racing tracks primarily benefits private parties and not the public. In making this argument, plaintiffs rely on the takings clause of the federal constitution and article VIII, section 1, of the Illinois Constitution.

The federal takings clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. This provision is made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV). *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 235 (2002). Article I, section 15, of the Illinois Constitution, the Illinois takings clause, provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art. I, §15.

Plaintiffs maintain that the surcharge should be deemed a taking because it is not characterized in the Act as a tax, but a license fee, because it does not have the fundamental characteristic of a tax in that it does not support government or government programs and because it is imposed as a condition of the casinos' continuation of a valuable property right–their licenses. Plaintiffs argue that a takings analysis should apply whenever the government takes property, whether real or monetary, from one party and gives it to another and that there is a need for heightened scrutiny to ensure a public purpose is being served.

We reject plaintiffs' assertion that a takings analysis applies here. It is well settled that the takings clauses of the federal and state constitutions apply only to the state's exercise of eminent domain and not to the state's power of taxation. *See County of Mobile v. Kimball*, 102 U.S. 691, 703, 26 L. Ed. 238, 241 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution"). The West Virginia Supreme Court has aptly stated this rule:

> "Courts universally have concluded that the takings clauses of the various state and federal constitutions do not apply in the context of taxing statutes, because the power to tax is a separate constitutional power from the power to take property by eminent domain. Case law from the United States Supreme Court and federal and state courts throughout the country makes clear that the constitutional takings clause is not a limitation upon the taxing power conferred upon legislatures by their respective constitutions. *See Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 L. Ed. 493, 504 (1916) (the Due Process Clause of the Fifth Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution'); *Branch v. U.S.*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) ('[E]ven though taxes . . . indisputably "take" money from individuals or businesses, assessments of that kind are not treated as *per se* takings'); *A. Magnano v. Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934) (taxing power of state or federal government not con-

> sidered a taking under the Fifth or Fourteenth Amendment) * * *." *In re Estate of Lewis*, 217 W. Va. 48, 58, 614 S.E.2d 695, 705 (2005).

See also Gilman v. City of Sheboygan, 67 U.S. (2 Black) 510, 17 L. Ed. 305 (1862). *See* generally 71 Am. Jur. 2d *State & Local Taxation* §61, at 351 (2001) (the takings clause is "appl[icable] to the power of eminent domain, but not to the power of taxation").

The same principle applies to fees, whether for certain services or licensing. In *Mlade v. Finley*, 112 Ill. App. 3d 914 (1983), the plaintiffs challenged certain circuit court filing fees as a violation of, *inter alia*, the takings clause. *Mlade*, 112 Ill. App. 3d at 916. The appellate court rejected the plaintiffs' argument "because the 'just compensation' [takings clause] provisions (Ill. Const. 1970, art. I, sec. 15; U.S. Const., amends. V and XIV, sec. 1) apply only to exercises of the power of eminent domain, not to applications of the authority to raise revenue for public purposes. *See Zelney v. Murphy* (1944), 387 Ill. 492." *Mlade*, 112 Ill. App. 3d at 924. *See also Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 65 L. Ed. 489, 41 S. Ct. 219 (1921). Numerous other cases have held the same. *See, e.g., Laredo Road Co. v. Maverick County, Texas*, 389 F. Supp. 2d 729 (W.D. Tex. 2005); *2284 Corporation v. Shiffrin*, 98 F. Supp. 2d 244 (D. Conn. 2000); *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 41 P.3d 87, 117 Cal. Rptr. 2d 269 (2002); *Rinn v. Bedford*, 102 Colo. 475, 84 P.2d 827 (1938); *City of Thomson v. Davis*, 92 Ga. App. 216, 88 S.E.2d 300 (1955); *BHA Investments, Inc. v. State*, 138 Idaho 348, 63 P.3d 474 (2003); *Jordan v. City of Evansville*,

163 Ind. 512, 72 N.E. 544 (1904); *Bobbie Preece Facility v. Commonwealth of Kentucky, Department of Charitable Gaming*, 71 S.W.3d 99 (Ky. App. 2001); *Board of Trustees of Falmouth v. Watson*, 68 Ky. 660 (1869); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947); *Rogers v. Hennepin County*, 124 Minn. 539, 145 N.W. 112 (1914); *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Comm'n*, 13 S.W.3d 635 (Mo. 2000); *Dunn v. Mayor & Council of City of Hoboken*, 88 A. 1053 (N.J. Sup. 1913); *Kisslinger's Appeal*, 59 Pa. D. & C. 126 (1947); *Smith v. Cortes*, 879 A.2d 382 (Pa. Commw. 2005); *Lamb v. Whitaker*, 171 Tenn. 485, 105 S.W.2d 105 (1937).

Ignoring this wealth of law, plaintiffs point to *Northern Illinois Home Builders Ass'n v. County of Du Page*, 165 Ill. 2d 25 (1995), where this court applied a takings analysis to a municipality's imposition of transportation impact fees. In *Northern Illinois Home Builders Ass'n*, a fee was imposed in connection with land. Specifically, a fee was imposed on persons constructing new housing developments to fund road improvements made necessary in light of the expected traffic growth from the development. *Northern Illinois Home Builders Ass'n*, 165 Ill. 2d at 30. The fee at issue in *Northern Illinois Home Builders Ass'n* was inextricably tied to real property and, thus, a takings analysis was appropriate.

The same is not true here. The 3% surcharge is in no way tied to real property. As such, *Northern Illinois Home Builders Ass'n* does not support plaintiffs' claim that a takings analysis is applicable here.

Plaintiffs also cite to *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct.

2131 (1998) (plurality op.), to support their argument that a takings analysis may be applied to a monetary obligation. However, we find plaintiffs' reliance on *Apfel* misplaced.

In *Apfel*, a plurality of Justices (Chief Justice Rehnquist, and Justices O'Connor, Scalia and Thomas) applied a takings analysis to a monetary obligation, but a majority of the Justices rejected the theory that an obligation to pay money constitutes a taking. Justice Kennedy, in his separate opinion explained:

> "Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and,

> with all due respect, unwise." *Apfel*, 524 U.S. at 540, 141 L. Ed. 2d at 481, 118 S. Ct. at 2154 (Kennedy, J., concurring in judgment and dissenting in part).

Justices Stevens, Souter, Ginsburg, and Breyer agreed with Justice Kennedy that the takings clause was not implicated, finding that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." (Emphasis in original.) *Apfel*, 524 U.S. at 554, 141 L. Ed. 2d at 490, 118 S. Ct. at 2161 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). It was noted that: "The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. [Citations.] * * * This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money * * *." *Apfel*, 524 U.S. at 554, 141 L. Ed. 2d at 490-91, 118 S. Ct. at 2161-62 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). Observing that "application of the Takings Clause here bristles with conceptual difficulties," Justice Breyer noted that the plurality's analysis would seemingly be applicable to ordinary taxes and other statutes and rules that routinely create financial burdens for some that benefit others. *Apfel*, 524 U.S. at 556, 141 L. Ed. 2d at 491-92, 118 S. Ct. at 2162-63 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). Thus, five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings.

In light of the foregoing, we conclude that the surcharge at issue here is not subject to a takings challenge. The Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest. The case at bar does not involve the state's exercise of its eminent domain powers, but rather involves its exercise of its taxing powers. We conclude that the surcharge is not a taking of private property within the meaning of the constitutional takings clauses. As such, a takings analysis is not applicable to plaintiffs' claim.

We now turn to plaintiffs' challenge that the surcharge violates article VIII, section 1, of the Illinois Constitution (the public funds clause).

Article VIII, section 1, of the Illinois Constitution of 1970 provides that "[p]ublic funds, property or credit shall be used only for public purposes." Ill. Const. 1970, art. VIII, §1. "[I]n order to proceed under article VIII, section 1(a) of the Illinois Constitution, facts must be alleged indicating that governmental action has been taken which directly benefits a private interest without a corresponding public benefit * * *." *Paschen v. Village of Winnetka*, 73 Ill. App. 3d 1023, 1028-29 (1979). In *Friends of the Parks*, we reiterated the well-settled principles regarding a public purpose:

> " 'This court has long recognized that what is for the public good and what are public purposes are questions which the legislature must in the first instance decide. [Citations.] In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the

> purported public purpose is but an evasion and that the purpose is, in fact, private. [Citations.] In the words of Justice Holmes, "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." [Citation.]' " *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312, 320 (2003), quoting *In re Marriage of Lappe*, 176 Ill. 2d 414, 429-30 (1997).

We have further expressed:

> "What is a 'public purpose' is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society. [Citations.] Moreover, '"[t]he power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general wellbeing of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they ofttimes call for the expenditure of public money."' [Citation.] The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose. [Citations.]" *In re Marriage of Lappe*, 176 Ill. 2d at 430-31, quoted by *Friends of the Parks*, 203 Ill. 2d at 320-21.

See also People ex rel. City of Urbana v. Paley, 68 Ill. 2d 62, 75, 76 (1977) (" '[w]e have held on a number of occasions that if the principal purpose and objective in a given enactment is public in nature, it does not

matter that there will be an incidental benefit to private interests.' " and " '[w]e have indicated that there is no constitutional prohibition against the use of public funds which inure to the benefit of private interests, so long as the money is utilized for a public purpose' "), quoting *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355-59 (1972) (observing that the courts of Illinois have adopted an expanding concept of "public purpose" where economic welfare is involved and that we have upheld legislation that has "economically benefited private interests, but has been motivated by, and served, a more compelling public interest").

In deciding whether a purpose is public or private, courts are

> " 'largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of the government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a public purpose and proper for the maintenance of good government.' *Hagler* [*v. Small*], 307 Ill. [460,] 474 [(1923)]." *In re Marriage of Lappe*, 176 Ill. 2d at 430.

See also In re Marriage of Lappe, 176 Ill. 2d at 437 ("If the principal purpose of the enactment is public in nature, it is irrelevant that there will be an incidental benefit to private interests"). If the purpose sought to be achieved by the legislation is a public one and it contains elements of public benefit, then

the question of how much benefit the public derives is for the legislature, not the courts. *McMackin*, 53 Ill. 2d at 357-58.

Plaintiffs contend that, from the face of the Act, the primary intended beneficiaries are private parties and, thus, the Act fails the public-purpose test. The standards established above require us to defer to the legislative findings announced in the Act unless plaintiffs have made a showing that the findings are evasive and that the purpose of the legislation is principally to benefit private interests.

Plaintiffs have not shown that the legislative findings, as stated in the Act, are evasive or deceptive. Thus, our inquiry turns on whether the surcharge created by the Act serves a public purpose.

Plaintiffs argue that the primary intended beneficiary of the surcharge are private parties, the track owners, and not the public. First, plaintiffs maintain that, because all of the proceeds of the surcharge are turned over to the track owners, this demonstrates the intended beneficiary is private. In a related argument, plaintiffs maintain that, because there is no effective control on how the track owners can use the 40% of the surcharge given to them, this demonstrates the intended beneficiary was private.

The plain language of the Act belies this argument. While it may be true the proceeds go directly to the track owners, the manner in which the owners must utilize the funds is controlled by statute. The Act specifically states how the money must be used: 60% goes to the tracks as purses and 40% goes to the tracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital

improvements related to live racing and the backstretch." The track owners cannot simply pocket any of the funds they receive, not even the 40%. The 40% is earmarked for specific purposes and must be used by the tracks for those purposes.

Plaintiffs also maintain that the benefits are conferred on the tracks without regard to need. We disagree. The legislature could reasonably have concluded that the total handle of a track related to how much of a benefit to the economy that track could achieve. Stated differently, the legislature could have believed that the tracks with the larger handles would be able to contribute more benefit to the industry and economy as a whole and, thus, should be entitled to more support.

Plaintiffs' arguments do not support their contention that the Act benefits only private parties. Certainly, the principal purpose of the Act is a public one: to stimulate economic activity, including the creation and maintenance of jobs and the attraction and retention of sports and entertainment, particularly betting on horse racing. *See Friends of the Parks*, 203 Ill. 2d at 316. We conclude that the Act does, in fact, serve a public purpose. The surcharge will benefit the general well-being of society and the prosperity of the people of the State of Illinois. *See Friends of the Parks*, 203 Ill. 2d at 316; *see also People ex rel. City of Urbana*, 68 Ill. 2d at 75 ("[s]timulation of commercial growth and removal of economic stagnation are * * * objectives which enhance the public weal"). The emphasis of the Act is to benefit the entire horse racing industry, not simply the track owners, and the collateral businesses associated with that industry. The surcharge will serve to reduce the costs of unemployment and the

evils attendant thereto should the industry collapse and the 35,000-plus associated jobs lost. *See People ex rel. City of Urbana*, 68 Ill. 2d at 74 (upholding act "whose stated object was to 'reduce conditions of unemployment and the evils attendant thereto, and to encourage the increase of industry within the State'"), quoting *McMackin*, 53 Ill. 2d at 354. The ultimate result of the surcharge will encourage an increase in industry in this state, including farming, breeding, and training, will stimulate commercial growth, and will revitalize an economically stagnant industry. All of these are objects that enhance the public "weal." *People ex rel. City of Urbana*, 68 Ill. 2d at 75. Illinois has a strong interest in preserving the viability of industries in this state, which in turn will benefit the economy of the state as a whole.

As we stated in *McMackin*:

> "We believe that conditions of unemployment within the State are well known and need no documentation. Legislation intended to alleviate these conditions and their inherent problems certainly is in the public interest. New and expanded industry in communities within the State provides work and opportunities not only for those who would be directly employed, but also for others who provide goods and services to those who live and work in the community. * * * The potential impetus to economic development within our State, which otherwise might be lost to other States with financing of this type, likewise serves the public interest. The private benefit resulting from the Act is incidental to the public purpose and benefit to be served, and there is no contravention of the

> constitution in this regard." *McMackin*, 53 Ill. 2d at 358.

The same is true here.

Because we find that plaintiffs have not shown the legislative findings in the Act are evasive nor have they shown that the purpose of the Act is primarily to benefit private interests, we defer to the legislative findings in the Act and the legislature's determination that the Act was necessary. Accordingly, we conclude that the Act does not violate article VIII, section 1.

III. Retroactivity

Plaintiffs raise a cursory argument regarding retroactivity. Plaintiffs argue that it is impermissible to impose the tax at issue here because it retroactively punishes them for entirely lawful competition. Citing to *Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131, plaintiffs contend the surcharge was unconstitutionally imposed as a retribution for past success which they could not possibly have known of.

In *Apfel*, a majority of the Court struck down, on varying constitutional grounds, an act that required coal mine operators to fund health-care benefits for retired workers. *Apfel*, 524 U.S. at 537, 141 L. Ed. 2d at 479, 118 S. Ct. at 2153. There, the liability reached back 30 to 50 years (*Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 475-76, 118 S. Ct. at 2150) and was a considerable financial burden on the defendant (*Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 476, 118 S. Ct. at 2150). Moreover, the liability would continue for many years in the future. *Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 476, 118 S. Ct. at 2150. Lastly, the liability was unrelated to any injury the defendant

had caused. *Apfel*, 524 U.S. at 537, 141 L. Ed. 2d at 479, 118 S. Ct. at 2153.

The case at bar is distinguishable from *Apfel*. The surcharge does not reach back in the distant past and is of a very limited duration, *i.e.*, two years. Further, while the surcharge might be a temporary financial burden on plaintiffs, it is related to injury the casinos caused to the horse racing industry. We find no constitutional violation on this ground.

IV. Equal Protection and Special Legislation

No arguments have been raised before us in connection with the equal protection and special legislation challenges and, thus, we need not address them.

CONCLUSION

The circuit court erred in granting summary judgment in favor of plaintiffs. Public Act 94–804 does not violate the uniformity clause. Moreover, the Act is not subject to a takings analysis, does not violate the public funds clause of the state constitution, and is not impermissibly retroactive. Accordingly, we reverse the judgment of the circuit court.

Reversed.

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

EMPRESS CASINO JOLIET CORPORATION, An Illinois corporation, et al.,
Plaintiffs,
vs.
JUDY BAAR TOPINKA, solely in her official capacity as TREASURER OF THE STATE OF ILLINOIS, et al.,
Defendants.
No.: 06 CH 1294

ORDER

This matter comes before the Court on the Plaintiffs' Motion for Summary Judgment, the Defendants' Motion for Summary Judgment, and the Intervenors' Motion for Summary Judgment, all brought pursuant to 735 ILCS 5/2-1005. The parties provided the Court with briefs, caselaw and oral argument. For the reasons set forth below, the Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Defendants' and Intervenors' Motion for Summary Judgment is GRANTED in part and DENIED in part. This Court finds that Public Act 94-0805 is unconstitutional as it violates the Uniformity Clause of the Illinois Constitution.

Background

The Illinois legislature authorized riverboat casinos in 1990 under the Riverboat Gambling Act. 230 ILCS 10/1 *et seq*. Currently, there are ten licenses available for riverboat casinos in the State of Illinois.

(Pl. Exh. 6, at p. 7.) Nine of those are in use, with the tenth license still in litigation. (Pl. Exh. 6, at p. 9.) The nine riverboat casinos are located in Alton, Aurora, East Dubuque, East St. Louis, Elgin, Joliet, Metropolis, Peoria and Rock Island. (Pl. Exh. 6, at p. 7.)

The Riverboat Gambling Act imposes two different types of taxes on riverboat casinos – an admission tax and a wagering tax. (Pl. Exh. 6, at p. 8.) An admission tax imposes $3.00 per person on all casinos except Rock Island, where the admission tax is $2.00 per person. (*Id.*) Of that tax, $1.00 is provided to the host community, and the remaining money goes to the State. (*Id.*) Further, each host community's local government receives a share equal to five percent of the adjusted gross receipts. (*Id.*) The wagering tax imposes required base amount payment from all riverboat casinos except Rock Island. (*Id.*) The wagering tax also imposes a graduated tax rate based upon the riverboat casinos' annual adjusted gross revenue. (*Id.*)

Currently there are five horseracing tracks with live racing in Illinois, namely Arlington Park, Balmoral Park, Fairmount Park, Hawthorne Race Course and Maywood Park. (Pl. Exh. 7, at p. 9.) In addition, the Illinois Racing Board authorizes horseracing at the Illinois State Fair, the Du Quoin State Fair, and the Brown County Fair each year. (Pl. Exh. 7, at p. 16.) Each racetrack is entitled to receive up to six off-track betting licenses, except Fairmount Park, which is entitled to receive seven licenses. (Pl. Exh. 7, at p. 6.) Horseracing tracks, like riverboat casinos, are required to also pay admission and wagering taxes.

In May 2005, the General Assembly passed P.A. 94-0805 which requires the four plaintiff riverboat casinos, those with adjusted gross revenues over 200 million dollars, to contribute 3% of their adjusted gross receipts into the Horse Racing Equity Trust Fund. (Pl. Exh. 1, Exh. A.) The General Assembly made the following findings in P.A. 94-0805:

> Section 1. Findings. The legislature makes all of the following findings:
>
> (1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has decreased by 42% from $835 million to $482 million.
>
> (2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more than 46% from 3,529 to 1,891.
>
> (3) That the decline of the Illinois horseracing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks

thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

(4) That Illinois agriculture and other businesses that support and supply the horse racing industry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.

(5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit this important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gambling has had on Illinois horseracing.

(*Id.*) The Act provides that 60% of the monies distributed under the Act shall be used for purses, while the remaining 40% of the monies shall be distributed as follows: 11% to any person "who had operating control of a racetrack that conducted live racing in 2002 at a racetrack in a county with at least 230,000 inhabitants that borders the Mississippi River and is a licensee in the current year." (*Id.*) It is undisputed that this 11% portion is designated for distribution to Fairmount Park, which is located Collinsville, Illinois. The remaining 89% is to be distributed pro rata to the other racetracks, excluding Fairmount Park, according to the aggregate proportion of total handle from wagering on live races. (*Id.*) These 40%

monies are to be used "by each organization licensee to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." (*Id.*) The Illinois Racing Board is charged with monitoring licensees to ensure that the moneys paid are distributed as provided in the Act. (*Id.*) The Act has a sunset provision of 2 years. (*Id.*)

Plaintiffs filed this complaint in May 2006 against the Treasurer, who collects the surcharge, and the Illinois Racing Board, who administers the monies, alleging that the Act results in an unconstitutional taking and a violation of the Due Process Clause, that the Act violates Article VIII, Section 1 of the Illinois Constitution, which requires that public funds "shall be used only for public purposes", that the Act violates both the Uniformity Clause of the Illinois Constitution and the Equal Protection Clauses of both the Illinois and U.S. Constitution, and finally that the Act constitutes special legislation in violation of the Illinois Constitution. (Pl. Exh. 1.)

Applicable Law

Standard of Review

The parties have filed cross motions for summary judgment. A trial court may render summary judgment only if the record shows that there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (2006); *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94, 98, 688 N.E.2d 68, 70 (Ill. 1997).

Legislative enactments enjoy a heavy presumption of constitutionality. *Friends of the Parks, et al., v. Chicago Park District, et al.*, 203 Ill. 2d 312, 786

N.E.2d 161 (Ill. 2003); *In Re Marriage of Lappe*, 176 Ill. 2d 414, 680 N.E.2d 380 (Ill. 1997). The party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity. Courts have a duty to sustain legislation whenever possible and resolve all doubts in favor of constitutional validity. *Lappe*, 176 Ill. 2d at 422, 680 N.E.2d at 384-85.

Public v. Private Use of Funds

The Supreme Court discussed the applicable standard for determining whether funds were being used for a public purpose in the case of *In Re Marriage of Lappe*, 176 Ill. 2d 414, 680 N.E.2d 380 (Ill. 1997). In *Lappe*, the plaintiff sought to declare sections of the Public Aid Code facially unconstitutional. The issue was whether the Public Aid Code, in allowing the Department the discretion to provide child support enforcement services to an individual who may be financially capable of pursuing enforcement privately, served a public purpose under article VIII, section 1 of the Illinois Constitution. *Id.*, 176 Ill. 2d at 422, 680 N.E.2d at 384.

> The Supreme Court noted the guidelines for this inquiry:
>
> In deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a

> public purpose and proper for the maintenance of good government.

Id., 176 Ill. 2d at 430, 680 N.E.2d at 388. The Supreme Court noted that the Public Aid Code served a public purpose by advancing the welfare of children and noted that Illinois has a strong interest in preserving and promoting the welfare of children. Further, even though the parties privately benefited from the legislation, said incidental private benefit did not destroy the public nature of the legislation. The Court noted:

> If the principal purpose of the enactment is public in nature, it is irrelevant that there will be an incidental benefit to private interests.

Id., 176 Ill. 2d at 437, 680 N.E.2d at 391. Thus, the legislation was upheld.

In *Friends of the Parks, et al., v. Chicago Park District, et al.*, 203 Ill. 2d 312, 786 N.E.2d 161 (Ill. 2003), the parties sought a declaratory judgment that the Illinois Sports Facilities Authority Act was unconstitutional. The Authority was created by the Act to facilitate, manage and construct sports facilities in the City of Chicago. The Authority received revenue from hotel taxes and the monies generated under the Act were used to construct Comiskey Park n/k/a U.S. Cellular Field. Subsequently, Section 3 of the Act was amended to include enabling legislation that permitted public financing of the physical improvements to Burnham Park, including Soldier Field. This newly amended legislation was subsequently challenged. The Supreme Court, citing *Lappe*, noted:

> This court has long recognized that what is for the public good and what are public purposes are questions which the legislature must in the first instance decide. In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private.

Id., 203 Ill. 2d at 320, 786 N.E.2d at 166. Applying those principles, the Supreme Court's examination was limited to determining whether the legislature's actions were constitutionally permissible. Deference to the legislative findings announced in the Act was mandated unless the plaintiffs made a threshold showing that the findings were evasive and that the purpose of the legislation was to principally benefit private interests. *Id.* Because the stated purpose of the Act was to materially assist the development and redevelopment of government owned sports facilities and to alleviate deleterious conditions and confer public benefits, the exercise of those powers was for public purposes. The improvements to the park benefited the members of the public served by the Chicago Park District as well as "incidentally" benefiting the Bears.

In this case, the General Assembly specifically found that the Act would assist the economy within this State, horse breeding, agriculture and employment opportunities within the State. If there is any reasonably conceivable state of facts showing that the legislation is rational, it must be upheld. *Arangold Corp., v. Zehnder*, 204 Ill. 2d 142, 147, 782 N.E.2d 786, 790 (Ill. 2003). Because there is a con-

ceivable public purpose to supporting agriculture and other Illinois industries, supporting employment opportunities within the State, as well as improving living conditions of residents of the State, the Act does not violate the terms of Article VIII, section 1(a) of the Illinois Constitution. Further, as there is no genuine issue of material fact, summary judgment in favor of the Defendants is appropriate as a matter of law.

Due Process/Equal Protection Clause

The standard to determine whether a statute violates due process is virtually identical to the standard used to determine if a statute violates the equal protection clause. *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 123-24, 703 N.E.2d 1, 4 (Ill. 1998). This Act does not involve a suspect classification, nor does it impinge on a fundamental right. Thus, the question to be determined is whether the Act bears a rational relationship to the public interest sought to be served and whether the means adopted to accomplish this goal are reasonable. *Arangold Corp.*, 204 Ill. 2d at 147, 787 N.E.2d at 790; *Messenger v. Edgar*, 157 Ill. 2d 162, 176, 623 N.E.2d 310, 317-18 (Ill. 1993). The court is required to identify the public interest the statute is intended to protect, examine whether the statute bears a reasonable relationship to that interest and determine whether the method used to protect or further that interest is reasonable. *Arangold Corp.*, 204 Ill. 2d at 147, 787 N.E.2d at 790. The legislation will survive so long as it is reasonably designed to remedy the evils the legislature has determined to be a threat to public health, safety and welfare. *People ex rel. Lumpkin*, 184 Ill. 2d at 117-18, 703 N.E.2d at 4. Under this rational basis test, the court may even hypothesize reasons for the legis-

lation, even if the reasoning advanced did not motivate the legislation action. *Id. See also Illinois Health Care Ass'n v. Illinois Dept. of Pub. Health*, 879 F.2d 286, 289 (7th Cir. 1989). As noted above, the General Assembly provided its reasons for the Act in its findings, which this Court has deemed reasonable to remedy public welfare.

The *Arangold* court noted that the due process clause does not prohibit the General Assembly from taxing one group to benefit another, nor is there a mandate that those taxed directly benefit from the tax. *Arangold Corp.*, 204 Ill. 2d at 151, 787 N.E.2d at 792. In this case, again, because there is a conceivable public purpose to supporting agriculture and other Illinois industries, supporting employment opportunities within the State, as well as improving living conditions of residents of the State, the Act survives scrutiny under the rational basis test and does not violate the due process or equal protection clauses. As there is no genuine issue of material fact, summary judgment in favor of the Defendants is appropriate as a matter of law.

Uniformity Clause

Plaintiffs contend that the Act violates the Uniformity Clause of the Illinois Constitution because only four of the nine riverboat casinos are required to contribute the 3% adjusted gross revenues under the Act. Initially, all nine riverboat casinos were included within the Act. However, the Act did not pass in the General Assembly until the five riverboat casinos from the southern portion of the State were removed from the bill. This is very clear in the record. (Pl. Exh. 4, at pp.68-69; Pl. Exh. 5, at p. 11.)

The Supreme Court in *Arangold Corp. v. Zehnder* provided the appropriate standard for a uniformity clause challenge and noted that, in order to prevail, the taxing classification (1) must be based on a real and substantial difference between the people taxed and those not taxed, and (2) must bear some reasonable relationship to the object of the legislation or to public policy. *Arangold Corp. v. Zehnder,* 204 Ill. 2d 142, 787 N.E.2d 786 (Ill. 2003). In that case, a wholesale tobacco distributor challenged the validity of the Tobacco Products Act of 1995 which authorized a tax on distributors to fund government programs providing long-term care for people financially unable to meet their medical needs. The Supreme Court noted that

> The party attacking a tax classification is not required to negate every conceivable basis that might support it. [citation omitted] When faced with a good-faith uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. The challenging party then has the burden of persuading the court that the taxing body's explanation is insufficient as a matter of law or unsupported by the facts. [citations omitted] Despite the more stringent standard under the uniformity clause, the scope of a court's inquiry is "relatively narrow." . . . "[I]n a uniformity clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of

> reasonableness and fairness as between groups of taxpayers." [citation omitted].

Arangold Corp., 204 Ill. 2d at 153, 787 N.E.2d at 793.

In *Arangold Corp.*, the distributor abandoned its claim that the Act discriminated between different classes of tobacco distributors, and rather only proceeded on the claim that the Act was insufficient as a matter of law or rather was unsupported by the facts. *Id.* The Supreme Court noted that the defendants provided evidence to support that the objective of the Act was to provide funds for the care of those persons who lacked the resources to pay for long-term medical care. The defendants further provided documentary evidence to establish that the Act taxed tobacco distributors because their products caused diseases which required such long-term care. Thus, the Supreme Court concluded that the tax bore a reasonable relationship to the objective of the Act. *Id.*, 204 Ill. 2d at 158, 787 N.E.2d at 796.

In this case, Defendants contend that the General Assembly could have based the Act upon the rationale that the four riverboat casinos that generate over two hundred million in revenue have a greater ability to absorb the cost. Ability to pay was upheld as a reasonable classification in the case of *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 837 N.E.2d 922 (Ill. 2005). In that case, the General Assembly imposed a surcharge for utilization of Industrial Commission services on employers but not on individual employees. The defendant in *Filan* argued that the General Assembly could have reasonably concluded that employers as a group would be less burdened by an increase in fees than would individuals because of the employers' ability to spread the cost over a larger budget or incorporate the cost

into the price of goods and services. *Id.* 216 Ill. 2d at 666, 837 N.E.2d at 931.

The Supreme Court in *Filan* agreed that there was a real and substantial difference in the classifications and noted that the amount of surcharge paid by each employer was based upon the amount of the premium paid, which in turn is based on the number of employees and the loss history of the employer. Thus, there was also reasonable correlation between the surcharge and the frequency of the employer's use of the Commission's services. The *Filan* Court further noted:

> As with any other cost, an employer may incorporate it into the price of goods and services. Individual employees would not, for the most part, have the ability to absorb the cost of the surcharge that employers do.

Id., 216 Ill. 2d.at 667, 837 N.E.2d at 931.

Other courts have upheld classifications based upon the benefits inured to the taxed parties versus those non-taxed. *See Geja's Café v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 606 N.E.2d 1212 (Ill. 1992) (upheld tax on restaurants who would benefit from expansion of McCormick Center as not violative of Uniformity Clause); *Grais v. City of Chicago*, 151 Ill. 2d 197, 601 N.E.2d 745 (Ill. 1992) (imposition of tax on properties which benefit most from the special service area did not violate Uniformity Clause); *Coryn v. City of Moline*, 71 Ill. 2d 194, 374 N.E.2d 211 (Ill. 1978) (tax on special service are to finance shopping mall upheld under Uniformity Clause as those taxed would benefit more).

However, courts have not been willing to uphold taxing challenges when there is no real and substan-

tial difference between those taxed and not taxed and where there is no reasonable relationship for the tax. *See Federated Distributors v. Johnson*, 125 Ill. 2d 1, 530 N.E.2d 501 (Ill. 1988) (tax on alcohol products which were virtually identical to wine coolers except for the method of production of alcohol, did not constitute a real and substantial difference in classification and violated Uniformity Clause); *Commercial National Bank of Chicago v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 557 (Ill. 1982) (tax on commodities and securities businesses that provide the same services as exempt businesses violated Uniformity Clause; while all businesses providing the services shared the benefits of the tax, not all shared the burden); *Fiorito v. Jones*, 39 Ill. 2d 531, 236 N.E.2d 698 (Ill. 1968) (occupational tax on servicemen violated Uniformity Clause); *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (Ill. 1933) (exemption in sales tax act granted to farmers who sold produce at retail violated Uniformity Clause as there was no difference between retail produce farmers in direct competition with other produce nonfarmer retailers).

As noted previously, Defendants contend that the General Assembly could have determined that the four riverboat casinos that generate over two hundred million in receipts could better absorb the surcharge. However, the findings of the General Assembly discuss only the negative impact of riverboat casinos on horseracing as a whole, not by geographical area. Further, the legislative record provided does not include any justification for the exclusion of the other five riverboat casinos from the bill other than to note that the House was unable to obtain the necessary votes to pass the bill until the five riverboat casinos from southern Illinois were removed from the bill. No findings or studies were presented

that the five riverboat casinos from the southern part of the state had less of an impact on the racetracks in that part of the state. No findings or studies were presented that the four riverboat casinos from the northern part of the state had more of an impact on the racetracks in that part of the state. Further, the Act does not exclude the racetracks from the southern part of the state from receiving monies, even though those five riverboat casinos from the southern part of the state are excluded from paying any monies. In fact, Fairmount Park, which is located close to two of the excluded riverboat casinos, receives a greater proportional share than the other racetracks. As there are no real and substantial differences between the two classes of riverboat casinos and as there has been no reasonable relationship provided for the classification, the Act violates the Uniformity Clause of the Constitution and summary judgment is granted in favor of the Plaintiffs on this issue of law.

Special Legislation Clause

Plaintiffs contend that the Act violates the Illinois Constitution's prohibition against special legislation, specifically Article IV, section 13, which states:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

Thus, the General Assembly is prohibited from conferring a special benefit on one group or person and excluding others that are similarly situated or arbi-

trarily discriminating in favor of a select group. *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 21, 802 N.E.2d 752, 758 (Ill. 2003). The standard for review is two fold: (1) whether the classification at issue discriminates in favor of a select group, and (2) if so, whether the classification is arbitrary. *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 325, 837 N.E.2d 88, 94 (Ill. 2005).

In this case, Plaintiffs' argument is that the Act is special legislation because it is primarily designed to benefit private owners rather than promote the general welfare. Plaintiffs further contend that the Act creates a benefit without rational basis, specifically citing the increase amount of subsidy to Fairmount Park, and thus, that the Act is arbitrary. Finally, in their Reply Brief, Plaintiffs contend that this is impermissible special legislation because the "perceived problem" that the Act was designed to address is not adequately connected with the purpose of the statute. In other words, the question becomes whether the General Assembly rationally could have believed that its method furthers the legislative goals. That answer has already been provided in the affirmative.

Further, courts have noted that even when select groups or "groups of one" benefit from legislation, the legislation does not necessarily fail, as long as there is a rational justification for the legislative focus and the classification used to focus the legislation is reasonably related to that justification. *See Chicago National Ball Club, Inc., v. Thompson*, 108 Ill. 2d 357, 483 N.E.2d 1245 (Ill. 1985); *City of Geneva v. The DuPage Airport Authority*, 193 Ill. App. 3d 614, 550 N.E.2d 261 (2d Dist. 1990). Again, there is a presumption in favor of validity of any legislation. In-

deed when a classification under a statute is challenged, if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts at the time of enactment must be assumed. *Chicago National Ball Club, Inc.*, 108 Ill. 2d at 369, 483 N.E.2d at 1251. Because in this case the rational basis test has been met, the special legislation argument must be rejected and summary judgment is appropriate in favor of Defendants as a matter of law.

CONCLUSION

For the reasons set forth above, and pursuant to Supreme Court Rule 18, this Court finds that Public Act 94-0805 is unconstitutional in that it violates the Uniformity Clause of the Constitution in its classification of taxed vs. non-taxed, and it cannot reasonably be construed in a manner that would preserve its validity. This finding is necessary to the decision herein rendered and such decision cannot rest upon an alternative ground. Finally, this Court finds that notice required by Rule 19 has been served, and that those served with such notice were given adequate time and opportunity under the circumstances to defend Public Act 94-0805.

3/26/07 /s/

Date Hon. Bobbi N. Petrungaro

APPENDIX C

**IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

EMPRESS CASINO JOLIET CORPORATION, an Illinois corporation, DES PLAINES DEVELOPMENT LIMITED PARTNERSHIP, an Illinois limited partnership d/b/a Harrah's Casino Cruises Joliet, HOLLYWOOD CASINO-AURORA, INC., an Illinois corporation, and ELGIN RIVERBOAT RESORT-RIVERBOAT CASINO, an Illinois general partnership d/b/a GRAND VICTORIA CASINO,
Plaintiffs,
v.
ALEXI GIANNOULIAS, solely in his official capacity as TREASURER OF THE STATE OF ILLINOIS, and the ILLINOIS RACING BOARD,
Defendants.

No. 06 CH 1294
Hon. Bobbie N. Petrungaro,
Judge Presiding

Filed April 20, 2007

FINAL JUDGMENT AND PERMANENT INJUNCTION ORDER

This matter comes before the Court for entry of a final judgment and order in light of the Court's decision on the parties' cross-motions for summary judgment issued on March 26, 2007. For the reasons set forth in the March 26 Order, IT IS HEREBY ORDERED THAT:

1. P.A. 94-0805 ("the Act") is declared unconstitutional and invalid in its entirety because it violates the Uniformity Clause of the Illinois Constitution;

2. Defendants are permanently enjoined from imposing or collecting the 3% surcharge imposed by the Act, or from taking any action against Plaintiffs as a result of their non-payment of that surcharge;

3. Plaintiffs are excused from further payment of the 3% surcharge imposed by the Act; and

4. Defendant Treasurer Alexi Giannoulias is hereby substituted as a defendant for Judy Baar Topinka and is ordered to refund to the Plaintiffs all surcharge payments collected pursuant to this Court's Order dated June 14, 2006, along with all interest required by the Protest Fund Act, 30 ILCS 230/2a, ~~within five (5) business days of the entry of this Order.~~

3/26/07 /s/
Date Hon. Bobbi N. Petrungaro

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APPENDIX D

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

EMPRESS CASINO JOLIET CORP., et al

Plaintiff

VS.

ALEXI GIANNOLULIAS, et al

Defendant

No. 06 CH 1294

COURT ORDER

STAY ORDER

This cause coming on to be heard on motion of the State Defendants, Alexi Giannoulias and the Illinois Racing Board, for a stay of enforcement of the order of this Court of April 20, 2007 entering a final judgment and permanent injunction, without bond, due notice having been given and the Court having heard argument and being duly advised in the premises;

IT IS HEREBY ORDERED THAT

1. Enforcement of the final order of this Court entered on April 20, 2007 is hereby stayed pending appeal.

2. The Court finds that the State Defendants are acting in their official capacity for the benefit of the public and the Court therefore orders that

* * *

this stay be without bond or other form of security.

3. The Agreed Preliminary Injunction Order entered on June 14, 2006 shall remain in full force and effect during pendency the of these proceedings on appeal, while this stay remains in effect. Plaintiffs shall continue making payments into the fund as provided in said order.

3/26/07	/s/
Date	Hon. Bobbi N. Petrungaro

APPENDIX E

SUPREME COURT OF ILLINOIS

Nos. 104586, 104587, 104590 cons.

EMPRESS CASINO JOLIET CORPORATION, etc., et al.,

appellees,

v.

ALEXI GIANNOULIAS, etc., et al.,

appellants.

Appeal, Circuit Court (Will).

ORDER

Petition for rehearing denied.

September 22, 2008

APPENDIX F

Public Act 094-0804

HB1918 Enrolled LRB 02935 LRD 32936 b

AN ACT concerning gaming.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Findings. The legislature makes all of the following findings:

(1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has decreased by 42% from $835 million to $482 million.

(2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more then 46% from 3,529 to 1,891.

(3) That the decline of the Illinois horseracing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

(4) That Illinois agriculture and other businesses that support and supply the horse racing in-

dustry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.

(5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit that important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gaming has had on Illinois horseracing.

* * *

Section 10. The Illinois Horse Racing Act of 1975 is amended by adding Section 54.5 as follows:

(230 ILCS 5/54.5 new)

Sec.54.5. Horse Racing Equity Trust Fund.

(a) There is created a Fund to be known as the Horse Racing Equity Trust Fund, which is a non-appropriated trust fund held separate and apart from State moneys. The Fund shall consist of moneys paid into it by owners licensees under the Riverboat Gambling Act for the purposes described in this Section. The Fund shall be administered by the Board. Moneys in the Fund shall be distributed as directed and certified by the Board in accordance with the provisions of subsection (b).

(b) The moneys deposited into the Fund, plus any accrued interest on those moneys, shall be distributed within 10 days after those moneys are deposited into the Fund as follows:

(1) Sixty percent of all moneys distributed under this subsection shall be distributed to or-

ganization licensees to be distributed at their race meetings as purses. Fifty-seven percent of the amount distributed under this paragraph (1) shall be distributed for thoroughbred race meetings and 43% shall be distributed for standardbred race meetings. Within each breed, moneys shall be allocated to each organization licensee's purse fund in accordance with the ratio between the purses generated for that breed by that licensee during the prior calendar year and the total purses generated throughout the State for that breed during the prior calendar year by licensees in the current calendar year.

(2) The remaining 40% of the moneys distributed under this subsection (b) shall be distributed as follows:

(A) 11% shall be distributed to any person (or its successors or assigns) who had operating control of a racetrack that conducted live racing in 2002 at a racetrack in a county with at least 230,000 inhabitants that borders the Mississippi River and is a licensee in the current year; and

(B) the remaining 89% shall be distributed pro rata according to the aggregate proportion of total handle from wagering on live races conducted in Illinois (irrespective of where the wagers are placed) for calendar years 2004 and 2005 to any person (or its successors or assigns) who (i) had majority operating control of a racing facility at which live racing was conducted in calendar year 2002, (ii) is a licensee in the current year, and (iii) is not eligible to receive moneys under subparagraph (A) of this paragraph (2).

The moneys received by an organization licensee under this paragraph (2) shall be used by each organization licensee to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch. Any organization licensees sharing common ownership may pool the moneys received and spent at all racing facilities commonly owned in order to meet these requirements.

If any person identified in this paragraph (2) becomes ineligible to receive moneys from the Fund, such amount shall be redistributed among the remaining persons in proportion to their percentages otherwise calculated.

(c) The Board shall monitor organization licensees to ensure that moneys paid to organization licensees under this Section are distributed by the organization licensees as provided in subsection (b).

(d) This Section is repealed 2 years after the effective date of this amendatory Act of the 94th General Assembly.

* * *

Section 15. The Riverboat Gambling Act is amended by changing Sections 7, 13, and 23 as follows:

(230 ILCS 10/7) (from Ch. 120, par. 2407)

Sec. 7. Owners Licenses.

(a) The Board shall issue owners licenses to persons, firms or corporations which apply for such licenses upon payment to the Board of the non-

refundable license fee set by the Board, upon payment of a $25,000 license fee for the first year of operation and a $5,000 license fee for each succeeding year and upon a determination by the Board that the applicant is eligible for an owners license pursuant to this Act and the rules of the Board. For a period of 2 years beginning on the effective date of this amendatory Act of the 94th General Assembly, as a condition of licensure and as an alternative source of payment for those funds payable under subsection (c-5) of Section 13 of the Riverboat Gambling Act, any owners licensee that holds or receives its owners license on or after the effective date of this amendatory Act of the 94th General Assembly, other than an owners licensee operating a riverboat with adjusted gross receipts in calendar year 2004 of less than $200,000,000, must pay into the Horse Racing Equity Trust Fund, in addition to any other payments required under this Act, an amount equal to 3% of the adjusted gross receipts received by the owners licensee. The payments required under this Section shall be made by the owners licensee to the State Treasurer no later than 3:00 o'clock p.m. of the day after the day when the adjusted gross receipts were received by the owners licensee. A person, firm or corporation is ineligible to receive an owners license if:

(1) the person has been convicted of a felony under the laws of this State, any other state, or the United States;

(2) the person has been convicted of any violation of Article 28 of the Criminal Code of 1961, or substantially similar laws of any other jurisdiction;

(3) the person has submitted an application for a license under this Act which contains false information;

(4) the person is a member of the Board;

(5) a person defined in (1), (2), (3) or (4) is an officer, director or managerial employee of the firm or corporation;

(6) the firm or corporation employs a person defined in (1), (2), (3) or (4) who participates in the management or operation of gambling operations authorized under this Act;

(7) (blank); or

(8) a license of the person, firm or corporation issued under this Act, or a license to own or operate gambling facilities in any other jurisdiction, has been revoked.

* * *

APPENDIX G

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as

a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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FILED
APR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-945

In the
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., *ET AL.*, PETITIONERS,

v.

ALEXI GIANNOULIAS, *ET AL.*, RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Nine riverboat casinos currently operate with Illinois gambling licenses. State law makes clear that they have no property interest in these licenses, but in exchange for contributions to the public welfare and compliance with comprehensive state gaming regulations, their licenses exempt them from Illinois' criminal anti-gambling laws.

Do these Illinois casinos have a property interest for Takings Clause purposes in the undiminished value of their gambling licenses and, even if so, is it a "taking" of "property" to tax casinos on a fraction of the gaming earnings derived from their licenses, where the tax supports a recognized public purpose and requires the payment of money, without regard to its source, that is unaffiliated with any interest in property?

RULE 29.6 STATEMENT

Balmoral Racing Club, Inc. and Maywood Park Trotting Association, Inc. are wholly owned subsidiaries of World Wide Wagering, Inc., a Delaware corporation.[1] World Wide Wagering, Inc. has no parent, and none of its shares is held by a publicly traded company.

Hawthorne Race Course, Inc., an Illinois corporation, has no parent and none of its shares is held by a publicly traded company.

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[1] Petitioners and *amici* improperly reference Balmoral Park Trot, Inc. as a respondent in this proceeding. The correct entity is Balmoral Racing Club, Inc. Pet. App. 5a.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. Quite simply, this is not the case that petitioners make it out to be. They stake their entire petition on the provocative premise that the Illinois Supreme Court has announced a "per se rule" exempting money from protection under the Takings Clause. But this premise is demonstrably false, for the court below carefully limited its holding to avoid such a sweeping rule. Petitioners dedicate much of their petition to this straw-man reading of the holding below—how it purportedly conflicts with this Court's case law and implicates a split in lower court authority. But none of this responds to the Illinois Supreme Court's actual (and unremarkable) holding that the Takings Clause does not apply here because petitioners are objecting to a tax requiring them to pay money that is unaffiliated with any fund or any interest in real or personal property. This reflects precisely the distinction that five members of this Court, relying on prior case law, drew in *Eastern Enterprises v. Apfel*, and ultimately petitioners ask this Court merely to reconsider the application of this established distinction to the facts here. But even this effort at error correction fails, for much of what petitioners challenge are the Illinois Supreme Court's controlling conclusions of state law, and petitioners ignore the dispositive fact that they are part of a state-licensed, limited gambling monopoly.

This last point also raises a larger, threshold problem that disqualifies this case as a vehicle to reach the question presented in the petition. Petitioners paint themselves as "disfavored" businesses forced to subsidize more politically influential competitors in a

free and open market. But nothing could be further from the truth. Unlike the "big box" stores and other competitive market participants that petitioners predict are next in line for a similar tax—and that their *amici* seek to protect—petitioners hold revocable licenses entitling them to operate in a limited, state-managed gambling monopoly. These facts not only drastically affect the traditional takings analysis (making this an idiosyncratic case for rethinking or even applying that analysis), but they are independently fatal to petitioners' takings claim (meaning there is no way even to reach the question that petitioners pose, were it presented). Courts refuse to extend takings protections to laws reducing the value of licenses, especially where, as here, state law makes clear that the licenses are not property, claimants operate in a field subject to comprehensive regulation, and the State shields claimants from competition from new market entrants by permitting them to engage in conduct that the State could eliminate entirely through its police power. Neither petitioners nor their *amici* suggest that any of these grounds is worthy of review, yet they alone require rejection of petitioners' takings claim.

STATEMENT

1. Gambling is illegal in Illinois, 720 ILCS 5/28-3 (2006), with very limited exceptions. Since 1927, Illinois has allowed parimutuel betting on horse racing, 1927 Ill. Laws 28—provided operators obtain a state license and submit to intensive state gaming regulation, 230 ILCS 5/1 *et seq.* (2006)—"to benefit the people of the State of Illinois by assisting economic development and promoting Illinois tourism," 230 ILCS 5/1.2 (2006). The results have been positive. Not only do tracks contribute to the public fisc through a daily tax on betting income, 230 ILCS 5/28.1 (2006), but horse racing has created an estimated 37,000 jobs, Pub. Act 94-0804 ("Act"), § 1(4). "Illinois agriculture and other businesses * * * support and supply the horse racing industry," *ibid.*, making horse racing "a significant component within the agribusiness industry," 230 ILCS 5/1.2(a) (2006). Meanwhile, other quarters, such as the show horse industry, enjoy collateral benefits as well. 94th Ill. Gen'l Assembly, H.R., April 26, 2006, at 65.

2. In 1990, in an effort to generate additional revenue for education, the General Assembly extended legalized gambling to include a small number of riverboat casinos. 230 ILCS 10/2 (2006). The Riverboat Gambling Act ("Gambling Act"), 230 ILCS 10/1 *et seq.* (2006), established ten "owners licenses" (nine are currently active) whose holders may operate riverboat casinos in designated areas throughout the State, with all regions of the State sharing in the economic benefits. 230 ILCS 10/7(e) (2006). In selecting licensees, the Gambling Act and its implementing regulations require the Illinois Gaming

Board to consider nearly a dozen factors, *Arch-View Casino Cruises, Inc. v. Ill. Gaming Bd.*, 636 N.E.2d 42, 43 (Ill. App. Ct. 1994), including "the highest prospective revenue to be derived by the State," 230 ILCS 10/7(b)(3) (2006); *see Arch-View*, 636 N.E.2d at 43; 86 Ill. Admin. Code § 3000.230(c)(2), and more broadly "the interests of the citizens of Illinois," *Arch-View*, 636 N.E.2d at 46. The four petitioners are the highest grossing of the current licensees.

a. Under Illinois law, a gambling license "does not create a property right." 86 Ill. Admin. Code § 3000.1105. The license remains a "revocable privilege," *ibid.*, which may not be transferred or even pledged as security without Gaming Board approval, 86 Ill. Admin. Code § 3000.235. It is renewable upon the payment of a fee and a determination that the licensee continues to meet all statutory and regulatory requirements, 230 ILCS 10/7(g) (2006), following a consideration of any other information that the Board deems appropriate, 86 Ill. Admin. Code § 3000.236(b). The Board also may invoke procedures to revoke or suspend licenses "as it sees fit," 230 ILCS 10/5(c)(11) (2006), and if a license is revoked or not renewed, the Board may re-issue it to another applicant, 230 ILCS 10/7.1 (2006), or may choose simply to conduct the former licensee's gambling operations itself, 230 ILCS 10/7.3 (2006).

Meanwhile, license holders must adhere to comprehensive state gambling rules. The Gambling Act is "designed to strictly regulate the facilities, persons, associations and practices relating to gambling operations pursuant to the police powers of the State." 230 ILCS 10/2(b) (2006). And casino

owners are not the only ones who must be licensed; those who manage the gambling must obtain "managers licenses," anyone who works on a casino riverboat must obtain an "occupational license," and anyone who provides "any equipment, devices, or supplies to a licensed riverboat gambling operation" must obtain a "suppliers license." 230 ILCS 10/7.4, 10/8, 10/9 (2006). The Gaming Board supervises all gambling operations, and its inspectors and agents must be present whenever gambling is in progress. 230 ILCS 10/5(b)(6), 10/7.3(c) (2006). Moreover, the Board may exclude persons from riverboats whose reputation it believes would call the integrity of gambling operations into question. 230 ILCS 10/5(c)(12) (2006). And even beyond these and other specific rules established by statute and regulation, owner licensees must conform to a general, "suitability" requirement and implement internal control systems consistent with Board-promulgated, "Minimum Internal Control Standards" covering over one hundred areas of operation. 86 Ill. Admin. Code §§ 3000.300, 3000.310, 3000.320, 3000.1105; www.igb.state.il.us/ mics/index.pdf.

b. In addition to initial licensing and renewal fees, licensees are subject to a series of daily taxes, by which the State collects a portion of the revenue derived from its limited gaming monopoly. Each day, owners must pay a per-capita admission tax and managers a per-capita admission fee, both of which go in part to local governments. 230 ILCS 10/12(a), (a-5), (b) (2006). Owners also must pay a daily privilege tax, assessed as a percentage of the prior day's adjusted gross receipts ("gross receipts less winnings paid to wagers"), which benefits, *inter alia*, local governments, the State Police,

the Illinois Department of Human Services, and the Education Assistance Fund. 230 ILCS 10/4, 10/13 (2006).

3. Riverboats and horse racing compete in the same gambling industry, 230 ILCS 5/1.3(a) (2006), and by 2006 the General Assembly recognized that the riverboats were having "a negative impact on horse racing," Act § 1(1). Racing had experienced a 42% decline in on-track wagering since riverboat gaming was introduced, *ibid.*, and this steep decline was inflicting severe damage on the State's breeding industry, *id.* § 1(2)-(3).

The General Assembly responded to counteract "the decline of the Illinois horseracing and breeding program, a $2.5 billion industry," and thus to bolster "Illinois agriculture and other businesses that support and supply the horse racing industry." Act § 1(3)-(4). The legislature had recently decreased the daily privilege tax rates that all casinos paid (from a top marginal rate of 70% of adjusted gross receipts down to 50%, 230 ILCS 10/13(a-3), (a-4) (2006)), and in 2006 it passed the Act to add an additional, daily tax on casino gambling earnings to improve horse racing tracks and purses. The Act created the Horse Racing Equity Trust Fund ("Fund") to be administered by the Illinois Racing Board. 230 ILCS 5/54.5(a) (2006). For two years, riverboat licensees with adjusted gross receipts in 2004 above $200 million (the four petitioners here) would pay into the Fund each day an amount equal to 3% of the prior day's adjusted gross receipts. 230 ILCS 10/7(a) (2006). The Illinois Racing Board was required to distribute these payments, with 60% going to increase racing purses and the remaining 40% going to

"improve, maintain, market and otherwise operate * * * racing facilities to conduct live racing." 230 ILCS 5/54.5(b) (2006).

Each of the petitioners chose to renew its state owners license after the Act went into effect—Empress in July 2006, Harrah's in September 2007, Hollywood in December 2006, and Elgin in June 2008—although, in Elgin's case, it did so after the Act's two-year tax period ended. See www.igb.state.il.us/annualreport /2008igb.pdf.

4. On May 30, 2006, petitioners filed a complaint in the Illinois courts for declaratory and injunctive relief against the state Treasurer and the Illinois Racing Board. R.C2. Among its claims, the complaint challenged the Act as an unlawful taking under both the Illinois and federal constitutions. R.C12.

On March 26, 2007, the trial court awarded summary judgment for respondents on all of petitioners' theories but one; the court held that the Act ran afoul of the Illinois Constitution's "Uniformity Clause," which limits the State's taxing power. Pet. App. 39a-50a. On April 20, 2007, the court issued its final judgment, declaring the Act unconstitutional on this ground and permanently enjoining respondents from imposing or collecting the 3% tax. Pet. App. 51a-52a (erroneously dated in the appendix as March 26, 2007).

Respondents appealed directly to the Illinois Supreme Court, which unanimously reversed. After holding that the Act complied with the Uniformity Clause, Pet. App. 7a-19a, it proceeded to consider and

(like the trial court) reject petitioners' alternative claims, *id.* at 20a-33a.

As relevant here, the court rejected petitioners' theory that the 3% surcharge was not a tax, but a taking. Pet. App. 20a-26a. The court recognized that calling the surcharge a "license fee," as petitioners urged, did not change its legal status, invoking decisions from around the country rejecting takings challenges to license fees, including in the specific context of gaming licenses. *Id.* at 22a-23a. The court likewise rejected petitioners' reliance on *Northern Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The court acknowledged that the former found a monetary fee to be a taking, but that fee "was inextricably tied to real property and, thus, a takings analysis was appropriate." Pet. App. 23a. And although *Apfel* contemplates that money or other intangibles can be the subject of a takings claim, the court below recognized that five Justices in *Apfel* refused to find a taking where, as here, the money need not come from or impair any specific, cognizable property interest. *Id.* at 24a-25a.

Finally, the court held that "[t]he plain language of the Act belie[d]" petitioners' claim that "the primary intended beneficiaries of the surcharge are private parties * * * and not the public." *Id.* at 29a. The court explained that "the principle purpose of the Act is a public one: to stimulate economic activity, including the creation and maintenance of jobs and the attraction and retention of sports and entertainment, particularly betting on horse racing." *Id.* at 30a. Relatedly, the court rejected petitioners' claim that

state law gave the tracks unfettered discretion to apply the proceeds as they please. As a matter of Illinois law, the court concluded, "[t]he track owners cannot simply pocket any of the funds they receive," as those funds are statutorily "earmarked for specific purposes" and "must be used by the tracks for those purposes." *Ibid.*

The court thus concluded that the Act neither "operate[s] upon" nor "alter[s] an identifiable property interest." *Id.* at 26a. Rather, it "involves [the State's] exercise of its taxing powers." *Ibid.* Accordingly, "the surcharge is not a taking of private property within the meaning of the constitutional takings clauses." *Ibid.*

The court subsequently denied rehearing, *id.* at 55a, but stayed its judgment pending the filing and resolution of this petition.

REASONS FOR DENYING THE PETITION

The petition should be denied for several reasons. Most obviously, the question it poses simply is not presented in this case. The Illinois Supreme Court did *not* purport to hold that money can never be the subject of a takings claim, as petitioners repeatedly assert, see Pet. i, 11, 12, 18, 23, and on which their petition critically depends. The court carefully distinguished its own prior decision recognizing that money may form the basis of a takings challenge, and it quoted lengthy passages from *Apfel* to the same effect. The court's actual holding is perfectly consistent with this Court's case law, and implicates neither of petitioners' purported "splits" in authority. In the end, petitioners merely ask this Court to recognize the Act as an example of a monetary assessment that amounts to a taking, either because it is not a "tax" at all or because it is both a "tax" and a "taking." See Pet. 26-30. But even this effort at error correction fails, for it requires the Court to ignore the dispositive fact—little mentioned in the petition or by any of the *amici*—that petitioners are licensees in a state-regulated, limited gambling monopoly.[2]

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[2] Petitioners tried this same gambit below. As respondents told the Illinois Supreme Court, petitioners "portray themselves as purely private marketplace competitors of the horse racing licensees, when in reality both the plaintiff casinos and the intervenor racetracks hold some of the very limited number of state gambling licenses," meaning they "are shielded from competition in a true market by the State's prohibition on other forms of gambling." Reply Brief of State Appellants at 1.

And petitioners' status as licensees in the State's limited gambling monopoly presents another, independent reason for denying the petition, consistent with respondents' argument below. See Reply Brief of State Appellants at 14 (distinguishing petitioners' takings authority, where "[t]he business receiving the property was not a licensee in an industry created by the State for the purpose of meeting specific public interests"; rather, "[i]t was, as the casinos misleadingly attempt to portray themselves, a purely private entity competing for the public's entertainment dollars"). This is because, for takings purposes, gambling and related licensees are not entitled even to claim a property interest in the undiminished value of their licenses, meaning petitioners' claim fails at the threshold, without reaching any of the issues raised in the petition. See Pet. App. 23a (Illinois Supreme Court opinion below, citing, *inter alia*, *Bobbie Preece Facility v. Commonwealth of Ky.*, 71 S.W.3d 99, 104 (Ct. App. Ky. 2002), which concluded that "an interest which depends totally on regulatory licensing is not a property interest that is compensable under the Takings Clause").

I. This Case Does Not Pose The Question Presented, Nor Is It A Vehicle To Revisit The Relationship Between A "Taking" And A "Tax."

The Illinois Supreme Court's ruling neither diverges from this Court's precedent nor implicates any split in authority, and petitioners claim otherwise only by mischaracterizing that decision. In fact, the court below did not adopt a broad rule that a "State's taking of money from private parties is wholly outside the

scope of the Takings Clause," Pet. i, so the petition's very premise is false. And petitioners' fallback request for error correction ignores key facts, chiefly that petitioners participate in a regulated, limited gambling monopoly.

1. As the Illinois Supreme Court acknowledged, see *supra* pp. 8-9; *infra* pp. 13-14, specific property interests in money may qualify as property for takings purposes, see *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-170 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-164 (1980). Thus, petitioners' claim that the court below announced a "per se" or "categorical" rule to the contrary, Pet. 11, 23, is false.

Petitioners cite *Webb's*, which struck down a Florida law requiring that interpleader funds be deposited in the registry of the county clerk, and the interest earned retained by the county as income. See 449 U.S. at 156 n.1, 164-165. There, the Court relied heavily on Florida law providing that the principal sum deposited in the court's registry was private property, coupled with the "long established general rule" that interest on interpleaded and deposited funds follows the principal and should be allocated to the owners of that principal. *Id.* at 160, 162-163. In *Phillips*, on which petitioners also rely, the Court followed *Webb's* to reach a similar result. Under Texas law, attorneys were required to pool certain client deposits in an Interest on Lawyers Trust Accounts ("IOLTA") account. See 524 U.S. at 161-162. But the interest on these accounts was diverted from the clients to others. See *id.* at 162. The Court found that

the interest was the private property of the clients for Takings Clause purposes, reasoning that the clients owned the principal and, under Texas law, interest is presumed to follow the underlying principal. See *id.* at 164-166. Finally, *Brown* merely confirmed the holding in *Phillips* that interest income on IOLTA accounts is client property. See 538 U.S. at 235.

The rule of *Brown*, *Phillips*, and *Webb's* is that specific property interests in money may qualify as property for purposes of the Takings Clause, but that is not disputed here, where the Illinois Supreme Court correctly determined that the need to pay money in this case is not a taking because the Act does not "operate upon or alter an identifiable property interest," in money or anything else. Pet. App. 26a. This is also consistent with the conclusion reached by five members of this Court in *Apfel*, that government action is not a taking if it does not "target[] a specific property interest," "depend[] upon any particular property," or (as to cash) burden a "specific, separately identifiable fund of money." 524 U.S. at 543 (Kennedy, *J.*, concurring in the judgment and dissenting in part); *id.* at 554, 555 (Breyer, *J.*, with Stevens, Souter, and Ginsburg, *JJ.*, dissenting).

Petitioners seize upon a single phrase in the decision below—that "'regulatory actions requiring the payment of money are not takings'"—to erect the straw-man argument on which much of the petition depends. Pet. 2, 9 (quoting Pet. App. 25a). But this is not the Illinois Supreme Court's holding. In fact, the court repeatedly acknowledged that the Takings Clause can protect money alone. The court thus distinguished its own prior decision in *Northern*

Illinois Home Builders, which applied takings principles to a monetary fee "tied to real property," and quoted at length from Justice Kennedy's concurrence in *Apfel*, which acknowledged that not only "land" but also "an intangible" and "even a bank account or accrued interest" can form the basis of a takings claim. Pet. App. 23a-24a (internal quotations omitted). In short, although the court was not asked to decide whether money alone can *ever* be the subject of a takings claim, the court nevertheless made clear that it can (consistent with its own prior case law, see Pet. App. 23a).

Thus, petitioners' suggestion that the decision below runs afoul of this Court's decisions "apply[ing] takings analysis to personal property of all kinds," Pet. 22, also fails. To reiterate, the Illinois Supreme Court had no doubt that government action that "appropriate[s], transfer[s], or encumber[s] an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest" may violate the Takings Clause. Pet. App. 24a (internal quotations omitted).

2. Petitioners' mischaracterization of the decision below is also essential to their claim that this case implicates two splits in lower court authority—one over "whether, and in what circumstances, a state's taking of money from private persons may constitute a 'taking' in the constitutional sense," and another over the proper application of *Apfel*. Pet. 10-11, 15. Again, the Illinois Supreme Court did not hold that government action requiring the payment of money is never a "taking"; it merely rejected petitioners' effort to

claim a tax—which petitioners may pay from any source and does not deprive them of any recognized property interest in specific funds—as a taking. Petitioners cannot marshal a single case at odds with this principle. To the contrary, the distinction between specific property interests in money (which may qualify for Takings Clause protections), and general obligations to pay a tax, whatever the source of funds (which do not), explains the result in every case in petitioners' first alleged split. And even if there were a split as petitioners describe it, with some courts announcing a *per se* takings exception for cases involving money and others applying something short of a *per se* rule, the Illinois Supreme Court is already in the latter camp, which is the one that petitioners favor. See *supra* pp. 8-9, 13-14. The second suggested split fares no better, for every court to address the issue has concluded that five members of the *Apfel* Court rejected the view, which petitioners seek to resurrect here, that a general liability to pay money is an unconstitutional taking. We consider each purported split in turn.

To manufacture the first, petitioners substantially overstate the holdings of *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (*en banc*); *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir. 1990); *BHA Investments, Inc. v. Idaho*, 63 P.3d 474 (Idaho 2003); and *Home Builders Ass'n of Greater Des Moines v. West Des Moines*, 644 N.W.2d 339 (Iowa 2002). Petitioners claim that these decisions announced a "per se rule" that the required payment of money can never be a taking. Pet. 11. But in reality, each court merely declined to apply a takings analysis to a general obligation to pay money. See

Commonwealth Edison, 271 F.3d at 1338-1340 (upholding requirement that utilities pay special assessment toward remediation of environmentally contaminated facilities); *Atlas Corp.*, 895 F.2d at 756-758 (upholding law requiring uranium producers to fund clean-up of uranium tailings piles); *BHA Investments*, 63 P.3d at 480-481 (upholding requirement that buyer of state liquor license pay State 10% of purchase price as transfer fee); *Home Builders Ass'n*, 644 N.W.2d at 351 (upholding law requiring builders and developers to pay fees, as condition of obtaining permits, to maintain local park system). In not one of these cases did the challengers argue that the assessments targeted a property interest in money, much less did the court hold that such an interest cannot form the basis of a takings claim. In language that petitioners omit, the Federal Circuit in *Commonwealth Edison* thus made "clear that a fund of money can be property protected under the Takings Clause," 271 F.3d at 1338 (citing *Phillips* and *Webb's*), while "the mere imposition of an obligation to pay money, as here, does not give rise" to a takings claim, *id.* at 1340.

Because none of these decisions questions the settled principle that specific property interests in money can be the subject of an unlawful taking, they do not conflict with *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991); or *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000), as petitioners contend. See Pet. 11-12. In each case, the court found an unconstitutional taking only after *first* finding that the government appropriated money protected by a specific property interest. The

provisions at issue did not merely impose "an ordinary liability to pay money," *Apfel*, 524 U.S. at 554 (Breyer, *J.*), but instead "target[ed] a specific property interest," *id.* at 543 (Kennedy, *J.*). Accordingly, these decisions are perfectly in line with the Illinois Supreme Court's decision below and with the lower court cases discussed above.

Kirk and *Smith* struck down laws providing States with a share of certain punitive or exemplary damages awards. See *Kirk*, 818 P.3d at 266; *Smith*, 125 P.3d at 948. As these courts recognized, the payments depleted plaintiffs' specific, identifiable property interest in favorable litigation judgments. In *Kirk*, state law recognized a property interest in exemplary damages. See 818 P.3d at 267, 272-273. And the law in *Smith* was, "for all intents and purposes, identical to the provision invalidated" in *Kirk*. 125 P.3d at 952. It "gave the State no interest in the judgment entered by the district court," while the plaintiffs "owned the entire punitive damages judgment" and thus had a "vested property interest therein." *Id.* at 950, 952. Likewise, the law invalidated in *United States Fidelity* imposed a retroactive burden on insurers who contributed (or who once had contributed) to a state workers' compensation fund. See 226 F.3d at 414-415. "The assessments against [the] plaintiffs ar[o]se from the specific fund of benefits they pa[id] to claimants in Louisiana each year" and were "charged by the insurers against the fund of reserves set aside from the premiums collected under specific insurance policies." *Id.* at 420. The insurers' monetary obligation therefore "refer[red] to an identifiable property interest or fund," *ibid.*, and was properly characterized as protected property for takings purposes.

Petitioners' reliance on state court decisions striking down fees, assessments, and exactions is equally misplaced. See Pet. 14 & n.8 (citing *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996); *Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994)). In each, the money due was tied directly to the development of a parcel of real property. The Illinois Supreme Court's ruling is fully consistent with these decisions, for it specifically recognized that assessments "inextricably tied to real property" are subject to a takings analysis. Pet. App. 23a (distinguishing its decision in *Northern Illinois Home Builders Ass'n*).[3]

The basis for petitioners' second alleged split is purported "uncertainty" surrounding this Court's decision in *Apfel*. Pet. 15. But there is no uncertainty over the single dimension of *Apfel* at issue here.

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[3] Petitioners cite *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), and *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), in a footnote. See Pet. 14-15 n.8. But the challengers in both cases waived their takings claims. See *Scottsdale*, 930 P.2d at 999-1000; *McCarthy*, 894 P.2d at 580. Even so, *Scottsdale* indicated that, had a takings claim been preserved, the court would have applied a takings analysis. See 930 P.2d at 1000. And although the court in *McCarthy* suggested that a takings analysis might not be applicable, see 894 P.2d at 580, this statement was *dicta* because the challengers had forfeited their takings claim.

In his concurrence, Justice Kennedy rejected the plurality's determination that the Coal Act, which required former plant operators to fund retiree health benefits, "takes property." 524 U.S. at 539-540. Although the Coal Act "impose[ed] a staggering financial burden" on former employers, Justice Kennedy recognized that, under this Court's prior decisions, a statute that "is indifferent as to how the regulated entity elects to comply or the property it uses to do so" is not a "taking." *Id.* at 540.

Four other members of the Court agreed that the "Takings Clause [did] not apply." *Id.* at 554 (Breyer, *J.*, with Stevens, Souter, and Ginsburg, *JJ.*, dissenting). These Justices recognized that the contrary rule would make every tax a "taking"; it would cast doubt on any law that "creat[es] burdens for some that directly benefit others" and thus subject every tax to a takings challenge. *Id.* at 556 (internal quotations omitted); see also *ibid.* ("If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"). A majority of the Court thus reaffirmed the rule that, in Justice Kennedy's words, an obligation to pay money does not "implicate the Takings Clause" if it does not "relate to a specific property interest." *Id.* at 544 (Kennedy, *J.*).

There is no lack of "uniform[ity]" among lower courts on this score. Pet. 15. In every one of petitioners' cases, the court drew precisely the same conclusion—that five members of this Court rejected the takings theory in *Apfel* because there was no connection between the employers' monetary obligation

and any specific, identifiable property interest. See *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 n.17 (4th Cir. 2002); *Commonwealth Edison*, 271 F.3d at 1339; *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 551 (6th Cir. 2001); *United States Fidelity*, 226 F.3d at 420; *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999); *Parella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998). In its decision below, the Illinois Supreme Court merely echoed this universally accepted understanding. See Pet. App. 25a.

To be sure, Justice Kennedy and the plurality had different reasons for finding the Coal Act unconstitutional, and thus courts have quibbled over what precedential weight to afford *Apfel*. Some have treated the votes of Justice Kennedy and the four dissenters as a holding. See, *e.g.*, *Commonwealth Edison*, 271 F.3d at 1339 ("We agree with the prevailing view that we are obligated to follow the views of that majority."); see also *id.* at 1339 n.10 (collecting cases). Others have given the decision somewhat narrower effect. See *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 & n.5 (11th Cir. 2008) (declining to decide whether concurring opinion is binding precedent but "agree[ing] with Justice Kennedy that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money"); *A.T. Massey*, 305 F.3d at 237 (*Apfel* "mandates judgment for * * * plaintiffs only if they stand in a substantially identical position to Eastern

Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (internal quotations omitted). But the Illinois Supreme Court is in the latter camp in any event. It did not purport to be bound by the conclusion reached by the concurrence and dissent in *Apfel*; it merely rejected petitioners' attempt to use *Apfel* affirmatively to find a taking. See Pet. App. 23a-25a.

In fact, no court has ever done what petitioners asked the Illinois Supreme Court to do—adopt the *Apfel* plurality's reasoning and, on that basis, invalidate a law as an unconstitutional taking based on reasoning that five Justices expressly rejected. See Brief of Plaintiffs-Appellees at 38-39. Rather, courts have properly recognized that this part of the plurality opinion cannot be binding. See, *e.g.*, *Swisher Int'l*, 550 F.3d at 1054 n.5. And therefore no court has held, as petitioners urge, that after *Apfel* government action creating a general obligation to pay money violates the Takings Clause.

Indeed, while petitioners trumpet *Ass'n of Bituminous Contractors*, see Pet. 16-17, the challengers in that case did not even forward a takings claim, see 156 F.3d at 1254. And the court there recognized that *Apfel* "renders takings claims *less* attractive to litigants because of the possibility that the five dissenters on the takings issue could form a majority in a later case." *Id.* at 1254 n.5. Likewise, in *A.T. Massey* and *Franklin County Convention Facility* (cited at Pet. 17), courts declined to find a Takings Clause violation—or any other constitutional harm—under *Apfel* because the plaintiffs were not "in a substantially identical position to" the coal operators. *A.T. Massey*, 305 F.3d at 237;

accord *Franklin County Convention Facility*, 240 F.3d at 552 (reasoning that *Apfel* lacks "precedential weight beyond its own facts"). Finally, while the Fifth Circuit identified a Takings Clause violation in *United States Fidelity*, the court acknowledged that the *Apfel* plurality's "takings clause rationale was accepted by only four justices" and carefully reconciled its decision with the concurrence, concluding that a "taking must refer to an identifiable property interest or fund." 226 F.3d at 419-420.

In short, petitioners cannot identify a single case whose holding would spell victory for them here, and thus the resolution of any uncertainty regarding *Apfel* cannot inure in their favor. Accordingly, even if it were necessary for this Court to clarify the precedential effect of *Apfel* (and it is not), this case does not provide a vehicle to do so.

3. Ultimately, petitioners appear to concede the distinction the Court has drawn—and the Illinois Supreme Court acknowledged below—between a general obligation to pay money, like a tax (not a taking) and an obligation to pay part of a specifically identified property interest in money (a taking). But petitioners and their *amici* nevertheless urge the Court to use this case to provide an example of an assessment that is not truly a tax, see Pet. 26-27, or of a tax that is also a taking, see *id.* at 27-30. This effort also fails. Petitioners rely chiefly on their claim that, unlike a proper tax, the Act demands money from a small number of casinos and eventually gives it to a small number of their competitors, not for the public good but for "essentially any purpose" that track owners desire. Pet. 26-29. Petitioners (in line with their *amici*) thus

compare themselves to "big box" stores forced to subsidize more politically potent "local retailers." *Id.* at 30. But this is wrong for several reasons.

First and most obviously, petitioners are not open market competitors. They are licensees in a small, regulated gambling industry, which the State could eliminate entirely under its police powers and that continues to exist only so long as the industry as a whole yields substantial public benefits—including jobs, revenue, and tourism. The Takings Clause does not apply where, as here, the State merely reduces or eliminates value that the State itself has created for private parties, as petitioners themselves recognized below. See Brief of Plaintiffs-Appellees at 60 n.30 (arguing that racetracks "had no right to [a] monopoly" on lawful gambling in Illinois, "[a]nd the State committed no wrong in taking it away from them, in order to promote tourism in the communities with riverboats and to raise * * * revenue"); see also *infra* pp. 32-33. The 3% tax is no more than a reduction in part of the value that the State-regulated gambling monopoly creates for its few licensees, in response to the negative effect that casinos are having on another part of that monopoly. Indeed, the Act is an effort to sustain the gambling industry by ensuring the continued viability of its racing component, with its critical employment and other benefits. See *supra* p. 3. And the tax currently applies to only four casinos because it is a progressive tax, and these are the four highest grossing (of only nine total). Moreover, quite unlike the "big box" example, petitioners undeniably "receive something in return" for the tax. Pet. 28. The State's gambling industry remains healthy enough to provide its anticipated public benefits, meaning

petitioners retain the valuable right to pursue super-competitive profits in Illinois' limited gambling monopoly.

Second, the Illinois Supreme Court expressly rejected petitioners' argument that the tax serves no public purpose, and that track owners have unfettered discretion to spend its proceeds. Applying its "plain language," the Illinois Supreme Court held that "the principle purpose of the Act is a public one"—"to stimulate economic activity, including the creation and maintenance of jobs and the attraction of sports and entertainment"—and, in addition, that "[t]he track owners cannot simply pocket any of the funds they received," as those funds are statutorily "earmarked for specific purposes and must be used for those purposes" as a matter of Illinois law. Pet. App. 29a-30a. These conclusions of state law are dispositive here. See, *e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).

Finally, petitioners claim that the Act requires payments "drawn from a specified corpus of gross receipts"—making it more like a taking than a general obligation to pay—because casinos "must make *daily* payments of a specified portion of the prior day's adjusted gross receipts for a two-year period." Pet. 18, 27. Petitioners compare this to the tax man hovering behind their dealers to seize 3% of each day's take. See Pet. 27. But the Act merely taxes *an amount equal* to 3% of adjusted gross receipts. It is entirely "indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Apfel*, 524 U.S. at 540 (Kennedy, *J.*). Petitioners' reliance on the requirement that they remit their payment by 3 p.m. the following

day is equally misplaced, for this is nothing more than an easily administrable, bright-line rule (like having to pay personal income tax by the close of business on April 15). As a matter of fact, it is the same deadline that *all* riverboat casinos must meet in paying the daily privilege tax that petitioners do not challenge, see 230 ILCS 10/13(a-10) (2006), and is akin to the race tracks' daily payment obligation. See *supra* pp. 3, 5-6.

In sum, this case does not present the question set out in the petition, implicates no split in authority, and is a far cry from the case that petitioners describe in which free market participants are forced to subsidize their more politically powerful competitors.

II. Petitioners Cannot Establish A Property Interest In The Undiminished Value Of Their Gambling Licenses.

Even if this case presented the question that petitioners pose, and the question were otherwise worthy of review, the fact that petitioners are licensees in a state-regulated, limited gambling monopoly puts that question out of reach, for these circumstances alone require affirmance of the judgment below.

1. To prevail on their Takings Claim, petitioners first must establish a protected property interest. See, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1001 (1984). Only then does one ask whether the Act "effect[s] a taking" of that interest. *Ibid.* Here, petitioners assume that they have a property interest in avoiding the 3% tax on their adjusted gross receipts. But this ignores that these receipts are returns on gambling licenses, and that such government-issued licenses (and financial returns thereon) are not

property within the meaning of the Takings Clause.[4] This alone is grounds to reject petitioners' takings claim, although it is not an issue presented in the petition or worthy of certiorari review, for it applies only to the small subset of cases involving government licensees, especially licensees in heavily regulated, limited monopolies subject to outright prohibition under the State's police power, and it implicates no alleged split in authority.

Whether something is protected property "is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips*, 524 U.S. at 164 (internal quotations omitted). Accordingly, when determining whether a license is property for purposes of the Takings Clause, courts rely on state law for indicia of property ownership, inquiring whether the license may be transferred, assigned, or sold; whether the license holder has the right to exclude others—as demonstrated by the extent of the government's power to regulate the underlying activity—as well as to revoke, suspend, or modify the license; and whether the government has provided by statute or regulation that the license does not confer a property right. See *Ruckelshaus*, 467 U.S. at 1002-1003; *United States v. Fuller*, 409 U.S. 488, 494 (1973).

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[4] That a license is not property under the Takings Clause does not mean that it cannot qualify for procedural due process protections. Property "is defined much more narrowly" for takings than for due process purposes. *Corn v. Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

Applying these principles, this and other courts have held that government-issued licenses and permits generally do not create property interests protected by the Takings Clause and, as a result, that government action that diminishes the *value* of those licenses and permits—including, as here, by taxing a portion of the earnings realized on them—cannot be the subject of a takings claim. Thus, in *Raceway Park, Inc. v. Ohio*, 356 F.3d 677 (6th Cir. 2004), the court held that horse-track owners had no property interest in their wagering revenues, for purposes of a takings challenge to an Ohio law redistributing a share of those revenues to competing tracks. See *id.* at 683. Based on its review of state law, the court concluded that "there is no long-standing right to the revenues earned from gambling on horse racing." *Id.* at 682-683; see also *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439-440 (8th Cir. 2007) (licensed lottery machine owner lacked property interest for takings purposes in state-issued license and, accordingly, in "continued operation of its enterprise," where Iowa law provided that possession of lottery machine license "is a privilege personal to that person or entity and is not a legal right" and prohibited licensees from selling, assigning, or transferring their licenses) (internal quotations and citation omitted).

And in *Fuller*, claimants had no property interest in grazing permits issued for neighboring land under the Taylor Grazing Act, and therefore no right to compensation for the component of their own land value attributable to the right to graze on the adjoining federal property. The permits were revocable, and Congress made clear that they "'shall not create any

right, title, interest or estate in or to the lands.'" 409 U.S. at 489 (quoting statute).

Other cases are to the same effect, finding no property right in the undiminished value of a government-issued license, and therefore sustaining laws reducing that value. See, *e.g.*, *Conti v. United States*, 291 F.3d 1334, 1341-1342 (Fed. Cir. 2002) (fishing permit); *Vanek v. State Board of Fisheries*, 193 P.3d 283, 293 (Ak. 2008) (same); *BHA Investments*, 63 at 480-481 (liquor license); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 495-496 (Ct. App. 2005) (certificates of approval for wine labels); *MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Comm'n*, 827 A.2d 580, 593 (Pa. Commw. Ct. 2003) (horse-racing license). In short, the Takings Clause simply is not implicated where, as here, the alleged "taking" of money "is associated with a [license] or permit" that is not itself protected property. *BHA Investments*, 63 P.3d at 481; accord *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993). The State has not confiscated petitioners' boats; it has assessed a tax limited by its terms to a small percentage of earnings derived from petitioners' participation in a limited gambling monopoly—a monopoly in which petitioners have no property right to participate at all.

As in *Hawkeye Commodity Promotions*, *Fuller*, and other cases, Illinois law expressly denies casino licensees a "property right" in their licenses. See 86 Ill. Admin. Code § 3000.1105. The license is a "revocable privilege," and holders may not assign, transfer or sell their licenses without state approval, see 86 Ill. Admin. Code §§ 3000.235, 3000.1105—all strikes

against finding a property interest, see, *e.g.*, *Ruckelshaus*, 467 U.S. at 1002-1003. As is the fact that these licensees lack the right to exclude others—in fact, the Gaming Board has exclusive control over the issuance of the licenses, see 230 ILCS 10/5(b)(1), 10/7 (2006), and may revoke or suspend them as the Board "see[s] fit," 230 ILCS 10/5(c)(11).

2. It is thus enough to defeat petitioners' takings claim that the Act taxes a small share of the value of petitioners' gambling licenses, a value in which petitioners have no property interest for takings purposes. But other facts ignored by the petition are themselves independently fatal to petitioners' claim. Petitioners are willing participants in a heavily regulated industry subject to complete elimination under the police power (and all but one opted to renew their license while the Act was in effect, see *supra* p. 7). Gambling "could be, and frequently has been, banned altogether." *United States & Fed. Commc'ns Comm'n v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); accord *Marvin v. Trout*, 199 U.S. 212, 224 (1905). In addition, "gambling activities are normally matters of state concern," *Iannelli v. United States*, 420 U.S. 770, 790 (1975), and "[t]he power of the State to enact laws to suppress gambling cannot be doubted," *Marvin*, 199 U.S. at 224; see also *Cleveland v. United States*, 531 U.S. 12, 21 (2000) (Louisiana gaming statute "licenses * * * engagement in pursuits that private actors may not undertake without official authorization"). Historically, an entity that accepts a state-issued gambling license obtains no more than "a suspension of certain governmental rights in their favor, subject to withdrawal at will." *Stone v. Mississippi*, 101 U.S. 814, 821 (1879).

Even petitioners must concede, as they did below, that Illinois is "not required to allow gambling" at all. Brief of Plaintiffs-Appellees at 64. Rather than banning it altogether, however, the General Assembly authorizes gambling in limited circumstances, subject to comprehensive regulation and provided it continues to yield public benefits. See *supra* pp. 3-6, 23. Such comprehensive regulation is inconsistent with a takings claim for several reasons. It suggests that any rights in the property have not "vested," *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986), or that the property amounts to a gratuity that the government may alter or revoke, see *Bowen v. Gillard*, 483 U.S. 587, 604 (1987). Such intrusive regulation is also incompatible with a reasonable, investment-backed expectation that the claimant will enjoy a continued right to the property, meaning the claimant cannot satisfy the *ad hoc*, factual inquiry for regulatory action that diminishes the property's value by restricting its use. See *Lingle v. Chevron*, 544 U.S. 528, 538-539 (2005) (citing *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)); see also *Ruckelshaus*, 467 U.S. at 1005; *Mitchell Arms*, 7 F.3d at 216 (takings claim "cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control") (internal quotations and citation omitted).[5] For one or more of

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[5] Because petitioners willingly entered an industry that is both highly regulated and subject to outright prohibition, there was no interference with their investment-backed expectations, a fact that is alone dispositive of their takings claim. See, *e.g.*, *Ruckelshaus*, 467 U.S. at 1006-1007. Should the two remaining "*Penn*

these reasons, "[t]hose who do business in the regulated field," like petitioners here, "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 227 (1986) (internal quotations omitted).

Central" factors for identifying a regulatory taking warrant consideration, they, too, counsel against a "taking" here. First, as to the "character of the governmental action," *Penn Central*, 438 U.S. at 124, the Act was an effort by the State to protect and preserve its horse-racing industry, and courts have long rejected takings challenges to such legislative "'adjust[ments of] the benefits and burdens of economic life to promote the common good,'" *Raceway Park*, 356 F.3d at 684 (quoting *Connolly v. Pension Benefit Gty. Corp.*, 475 U.S. 211, 225 (1986)). Second, as for "[t]he economic impact of the regulation on the claimant," *Penn Central*, 438 U.S. at 124, the 3% tax is reasonably related to the encouragement of horse racing and, at worst, means that petitioners' gambling revenues are not as much as they would have liked, see *Raceway Park*, 356 F.3d at 685-686 & n.6. Finally, to the extent that petitioners would allege a categorical taking, applicable where there has been a "permanent physical invasion," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or a deprivation of "*all* economically beneficial uses" of property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), this Court has rejected application of *Loretto* to an exaction of money, recognizing that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989).

Nor is the government required to pay for value that it creates, see *Fuller*, 409 U.S. at 492, or "that it might have destroyed under the exercise of governmental authority other than the power of eminent domain," such as the police power, *ibid.*; see also *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). Thus, in *Fuller*, claimants' land enjoyed added value because it bordered federal property for which grazing permits were available, but this additional value was not compensable on a takings theory, for "[t]hat is a value which the government itself created and hence in fairness should not be required to pay." 409 U.S. at 491, 493 (internal quotations omitted). A contrary rule would require compensation for "the value of a right that the Government * * * can grant or withhold as it chooses," like the value that Illinois creates for licensees in its limited gambling monopoly. *Id.* at 493 (internal quotations and citation omitted). If an industry "can be abolished at any time that the Legislature may deem proper for the safeguarding and protection of the public welfare," *Carney v. Attorney General*, 890 N.E.2d 121, 132 (Mass. 2008) (internal quotations omitted), "claimants operating in such fields should expect that the government can effectively regulate them out of business," *Buhmann v. Montana*, 201 P.3d 70, 91 (Mont. 2008), and have no right "to compensation where the government chooses to modify the program that created the benefit in the first place," *Carney*, 890 N.E.2d at 132.

In the same manner, because Congress has the power "completely to regulate navigable streams," any compensation due upon condemnation of riparian land must omit the land's value as a port site. *United States v. Rands*, 389 U.S. 121, 125 (1967). "[T]hese rights and

values are not assertable against the superior rights of the United States" and thus "need not be paid for when appropriated by" the federal government; in fact, to require payment for such "value would be to create private claims in the public domain." *Id.* at 125-126 (internal quotations omitted).

It is therefore no surprise that courts routinely reject takings claims by gambling enterprises, including claims like petitioners' that arise from a tax on wagering revenues or other restrictions limiting the profitability of a gambling license. See, *e.g.*, *Raceway Park*, 356 F.3d 685-687 (state law requiring racetracks to contribute part of their wagering revenues for redistribution to other racetracks); *Star Northwest, Inc. v. City of Kenmore*, No. C05-2133P, 2006 WL 2372395, at *3-*4 (W.D. Wash. Aug. 10, 2006) (municipal ordinance banning card rooms); *Carney*, 890 N.E.2d at 132 (state law banning parimutuel dog racing); *Mibbs, Inc. v. South Carolina Dep't of Revenue*, 524 S.E.2d 626, 628 (S.C. 1999) (county ban on cash payouts from video poker machines); *Sorema v. Parker*, 22 A.2d 513, 516 (Vt. 1941) (state law banning slot machines); *Preece Facility*, 71 S.W.3d at 104 (denial of renewal application for license to operate charitable gaming establishment). A gambling industry participant's "expectations in its * * * business" must be "discounted by" "the heavily regulated nature of gambling." *Hawkeye*, 486 F.3d at 442; see also *Mitchell Arms*, 7 F.3d at 216 (same for firearms exportation); *BHA Investments*, 63 P.3d at 480 (same for liquor sales); *Bronco*, 29 Cal. Rptr. 3d at 498 (same); *Buhmann*, 201 P.3d at 91 (same for exotic game farming). (And the Illinois Supreme Court relied on *Preece Facility* and other cases in this line for its judgment below. See Pet.

App. 22a-23a.) For this reason, too, petitioners' takings claim fails because petitioners belong to a heavily-regulated state gambling monopoly, an independent ground having nothing to do with the issues petitioners seek to have this Court consider.

* * *

In short, petitioners do not participate in an open, competitive market. They are state licensees exempt from Illinois' anti-gambling laws—allowed to offer casino gambling in exchange for their submission to intensive regulation (backed by the threat of license suspension, revocation, or non-renewal) and ongoing financial and other contributions to the public welfare. Alone or in combination, these facts require affirmance of the Illinois Supreme Court's judgment, making this case a singularly flawed vehicle for addressing the question that the petition presents, were that question even implicated by the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL RACING CLUB, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N.,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Illinois

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PETITIONERS' REPLY BRIEF

The question presented in this case – whether, and in what circumstances, the government's expropriation of money may constitute a taking – is one of enormous importance. In *Eastern Enterprises*, a fractured Court was unable to provide a definitive answer to that question. Since that decision was issued, the law on the issue in the lower courts has been "chaotically unsettled." George F. Will, *Racing Past the Constitution*, THE WASHINGTON POST, Apr. 12, 2009, at A17. Scholars likewise have been unable to "offer[] a coherent theory of the relationship between taxes and takings." Kades, 97 NW. U.L. REV. at 190. Pointing to this uncertainty, and to the tremendous practical significance of the question, commentators have described the decision below as a profoundly troubling one that warrants this Court's review. *Riverboat Robbery*, THE WALL STREET JOURNAL, March 24, 2009, at A16; Will, *supra*, at A17.

Although respondents attempt to minimize the scope of the Illinois Supreme Court's decision, they appear to accept the central premises of the petition. They seem to recognize that a taking *would* occur were "'big box' stores forced to subsidize more politically potent 'local retailers.'" Opp. 22. They acknowledge that the federal courts of appeals are in conflict on "what precedential weight to afford" *Eastern Enterprises*. *Ibid.* They have nothing to say about the dubious provenance of the Act (see Pet. 6-7 n.3), or the gerrymandering that targeted the Act's burden at a subset of less politically powerful casinos. See American Legislative Exchange Council ("ALEC") Br. 14-15. And in light of the extraordinary outpouring of amicus support for the petition,

respondents cannot seriously dispute the significance of the question presented.

In nevertheless opposing review, respondents offer two arguments. They insist that the issue raised in the petition "simply is not presented in this case" because the Illinois Supreme Court did not "hold that money can never be the subject of a takings claim." Opp. 10. And departing from the holding below, they maintain that petitioners' takings claim must ultimately fail because "gambling and related licensees are not entitled even to claim a property interest in the undiminished values of their licenses." *Ibid.* Neither of these arguments offers a valid basis for denying review of the straightforward and important question presented in the petition.

A. The Court Should Resolve The Question Whether The Exaction Of Money May Effect A Taking

1. As for respondents' first argument against review, there can be no doubt about the nature of the holding below – or that the question presented by the petition is indeed "in this case." The Illinois Supreme Court declared expressly and repeatedly that "the takings clauses of the federal and state constitutions apply only to the state's exercise of eminent domain and not to the state's power of taxation." Pet. App. 21a. See *id.* at 23a ("The 3% surcharge is in no way tied to real property."), 24a (in *Eastern Enterprises* "a majority of the Justices rejected the theory that an obligation to pay money constitutes a taking"), 25a ("five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings"), 26a ("The case at bar does not involve the state's exercise of its eminent domain powers, but

rather involves the exercise of its taxing powers."). Whether the court below was correct in this holding, which expressly rejected the contrary conclusion of the *Eastern Enterprises* plurality (see *id.* at 24a-25a), is a matter that warrants this Court's attention.

2. In arguing against review, respondents suggest that the Illinois Supreme Court recognized two narrow exceptions to its otherwise categorical rule that expropriations of money are not takings; these are said to apply when the exaction is (1) "'tied to real property'" or (2) derived from "specific property interests in money," which respondents take to mean some sort of defined fund. Opp. 13, 15. For several reasons, respondents' attempt to minimize the import of the state court's decision is wrong.

First, respondents' description of possible limits on the scope of the holding below is entirely beside the point because the Illinois Supreme Court found *neither* exception to apply in this case. Instead, its clear and unequivocal holding was that the exaction of money can *never* be a taking in circumstances like those here, where a small group of identified entities is required to pay a specified amount of money to particular competitors.

Second, respondents' observation that the court below might entertain a takings claim regarding unspecified "identifiable property interest[s]" (Opp. 22) does nothing to diminish the conflict in the lower courts identified in the petition. It is plain that the Fifth Circuit in *United States Fidelity* (discussed at Pet. 13) – which followed the analysis of the *Eastern Enterprises* plurality – rejected the rule adopted by the Illinois Supreme Court when it held that a taking was effected by a state law that "extract[ed] money from businesses." 226 F.3d at 417. Respon-

dents' argument to the contrary (Opp. 17) rests on a misreading of *United States Fidelity*. There, the insurer property owners' liability was *measured by* amounts previously paid into a workers' compensation fund, just as the assessment here is measured by daily casino revenues. See 226 F.3d at 414-415, 420 ("The assessments against these plaintiffs arise from the specific fund of benefits they pay to claimants in Louisiana each year."). But there was no requirement in *United States Fidelity* that the assessment be paid *from* any particular source, and the State did not purport to take any particular fund or account owned by the insurers. See *id.* at 414-415.[1]

Respondents get no further in their attempt to distinguish *Smith* and *Kirk* on this ground. Opp. 17. In those cases, state supreme courts held that takings had been effected by laws requiring payment to the State of a portion of punitive damages awards. See Pet. 11-13. In its practical operation, the Act challenged in this case is identical, requiring the payment of a portion of each day's casino revenues – although the transfer here is *more* troubling because the funds go directly from the property owner to private competitors, rather than to the State for public use. In each case, the property owner had a vested, legal entitlement to particular funds and was forced by the State to surrender a portion of those funds. It is not at all apparent why the funds at issue in *Smith* and *Kirk* were any more an "identified prop-

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[1] Respondents rely on the Fifth Circuit's statement that the assessments were "'charged by the insurers against [a] fund of reserves.'" Opp. 17. But as described by the Fifth Circuit, there was no statutory requirement to draw the assessment from a reserve fund; the insurers were free to satisfy their liability from any source. See 226 F.3d at 416 & n.7, 420.

erty interest in money" (Opp. 22) than are the already earned daily revenues of specified casinos.

Third, to the extent that respondents are correct that, when money is at stake, the takings inquiry turns on whether the challenged state action "operate[s] upon * * * an identified property interest" or is "measured by a property interest," as suggested by Justice Kennedy's concurrence in *Eastern Enterprises* (524 U.S. at 540), that provides a compelling reason to *grant* review. This Court's guidance plainly is needed to identify the characteristics that qualify an "identified property interest" in money for Takings Clause protection.

As we showed in the petition (at 18, 26-27), the funds at issue here have many of the qualities of a separate account: The sum taken is a portion of the net wagering activity on a particular day at individual casinos, which must be paid over by 3:00 p.m. the day following receipt. See Pet. App. 60a. In response, respondents assert that the Act merely requires payment of "*an amount equal* to 3% of adjusted gross receipts" and is indifferent to the origin of the funds used to satisfy this obligation. Opp. 24. But when payment is required less than twenty-four hours after funds are received, the practical reality is that *those* funds will be the source of the payment.

In any event, respondents are here tripped up by their own observation that money is fungible. Just as the Takings Clause would serve no purpose "if the government could take a person's land by eminent domain, compensate the owner, and then reclaim the money without constitutional limitation" (Fee, 76 S. CAL. L. REV. at 1038), it surely cannot matter for takings purposes that the property owner hands over to the government a particular dollar earned on April 1

rather than an identical dollar that the owner substituted for the first one on April 2.

Fourth, we showed in the petition (at 15-17) that the federal courts of appeals are divided on the meaning of *Eastern Enterprises*. Respondents acknowledge this disagreement but label it "quibbli[ing]" because the courts agree that five Justices rejected a takings theory in that case. Opp. 19-20. That the lower courts all use the same arithmetic, however, does nothing to settle their disagreement about whether the concurring and dissenting opinions in *Eastern Enterprises* may be aggregated to yield a binding rule that has precedential effect. See Pet. 16-17. Nor are respondents correct in asserting that "no court has held * * * that after *Apfel* government action creating a general obligation to pay money violates the Takings Clause." Opp. 21. As we have shown, the Fifth Circuit in *United States Fidelity* followed the analysis of the *Eastern Enterprises* plurality, while the court below expressly rejected it (Pet. App. 25a). This Court should settle this disagreement about the meaning of one of its recent and very important decisions.

Fifth, respondents make no attempt to defend the merits of the decision below, to explain away its logical inconsistencies, or to reconcile its holding with the purpose and history of the Takings Clause. Although respondents do not deny that a taking would occur were the casinos required to hand over their slot machines or cash registers to the tracks, they nowhere explain why a takings challenge is wholly precluded when the State takes cash worth just the same amount. They also cannot square the holding below with decisions of this Court or writings of the Framers indicating that "money *is* property."

Wash. Legal Found., 271 F.3d at 866 (Kozinski, J., dissenting). See Pet. 24 & n.13. And they do not deny that the Act entirely lacks "the kind of general applicability that mutes the concerns behind takings jurisprudence." *Unity Real Estate*, 178 F.3d at 676.

Of course, a requirement to pay money generally will not effect a taking in the constitutional sense; taxes typically are not takings because they "spread the cost of operating the governmental apparatus throughout the society." Sax, 74 YALE L.J. at 75-76. But given the close "factual inquir[y]" required by takings analysis (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); see *Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J.)), a confiscation of money may not be categorically insulated from takings review simply because it is labeled a tax by a state court. Here, the Act has characteristics that decisively set it aside from the usual run of taxes: It takes funds from a small group of identified payers; hands over those funds to a small group of identified private recipients; and requires that the transfers be made on a daily basis. Given the manner in which the "law has struggled with the relationship between taxes and takings" (Fee, *supra*, 76 S. CAL. L. REV. at 1038), the difficult and complex question whether the charge imposed by the Act may effect a taking can be answered only by this Court.

B. Petitioners' Status As Regulated Businesses Is Immaterial To The Question Presented

Respondents' second contention – that a taking could not have occurred because the casinos are state-licensed and heavily regulated, and therefore do not have a cognizable interest in the undiminished value of their licenses (Opp. 23, 25-34) – is a

distraction. Although respondents argued this theory below, it was not adopted by the Illinois Supreme Court and formed no part of that court's analysis. The court instead held, flatly and expressly, that the Takings Clause does not apply to confiscations of money that take the form of a tax. Pet. App. 21a-26a. On the face of it, this holding applies in precisely the same way to money taken from a casino, a newspaper, a factory, or an operator of lemonade stands. That is all that need be said to dispose of respondents' argument that "government action that diminishes the *value* of [petitioners'] licenses and permits * * * cannot be the subject of a takings claim." Opp. 27.

It may be added, though, that the court below did not address this point for a good reason: A claim for the reduction in the value of petitioners' licenses has never been a part of this case. Petitioners do not maintain that they may receive compensation for the diminished value, or revocation, of a state-issued license, which is the subject of most of the authority cited at Opp. 27-33. Their contention, instead, is that specific moneys, lawfully earned and possessed, may not be taken by the State and transferred directly to someone else. See Pet. App. 20a. As to that contention, the authorities cited by respondents say nothing.

If respondents mean to argue more generally that a takings challenge may not be brought by a business that is licensed and heavily regulated by the State, presumably on the theory that the State has made the business's revenues possible or that the business has voluntarily subjected itself to any payment demanded (see Opp. 29-33), they surely are wrong. A great many businesses and professions in

Illinois require licenses – *e.g.*, medicine (225 ILCS 60/3), insurance (215 ILCS 5/121), barber shops (225 ILCS 410) – and the State could outlaw virtually *any* business, so long as it is able to articulate a rational basis for doing so. But even so, the State surely may not, with impunity, take property from such entities and individuals, including money that has been lawfully earned. Respondents seem to agree with this proposition, at least in part; they do not deny that Illinois would effect a taking if it required petitioners to give the tracks particular items of non-monetary personal or intangible property. See Pet. 24. Respondents offer no reason to doubt that the same rule applies when the compelled transfer is of money rather than some other form of property.

C. The Question Presented Is One Of Tremendous Importance

Finally, review is warranted because the question presented is one of great importance, involving a matter on which the Court's guidance is urgently needed. Although respondents try to minimize the significance of the holding below, they do not challenge the essential nature of the Illinois Supreme Court's decision: that government is not subject to Takings Clause scrutiny *at all* when it transfers funds from identified businesses to specific competitors. If this rule remains in place, "[i]n a time of fiscal pressure, Illinois-type actions may be increasingly tempting for state and local governments to get money to prop up politically favored businesses," an outcome that "will only encourage corruption." *Riverboat Robbery*, THE WALL STREET JOURNAL, *supra*, at A16. For this reason, and in light of the pervasive "confusion" on the point in the lower courts, ALEC – representing 2000 state legislators – has

urged the Court to grant review of the "egregious take-and-transfer" in this case so as to "afford[] legislators across the nation much-needed guidance on the constitutionality of such arrangements." ALEC Br. 16.

This case provides an excellent vehicle for doing so. The petition presents the straightforward question whether the taking of money is wholly outside the scope of the Takings Clause, and does so in a context that allows the Court to define the circumstances where money constitutes a "specific property interest" for takings purposes. *Eastern Enterprises*, 524 U.S. at 543 (Kennedy, J.). And the considerations that may make the seizure of money a taking are presented here in the starkest and most disturbing form: Funds were taken from a small group of identified businesses that were selected because they were politically disfavored and unprotected,[2] and were transferred directly (without even passing through the state treasury) to identified competitors, as the result of a process that was tainted by corruption. Putting the best face on it, the State forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong*, 364 U.S. at 49); more likely, the State has effected the naked taking of A's property "for the sole purpose of transferring it to another private party B." *Kelo*, 545 U.S. at 477.[3] In either

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[2] Respondents' contention that petitioners were singled out by the Act because "it is a progressive tax" (Opp. 23) cannot be taken seriously. There is little doubt that the Act draws the line it does because downstate casinos were politically protected. See ALEC Br. 14-15.

[3] Respondents point to the Illinois Supreme Court's statements that the Act's purpose is a "'public one'" and that the funds

case, this Court's intervention is necessary to ensure that such a troubling abuse of state authority is subject to challenge under the Takings Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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taken are "'earmarked for specific purposes.'" Opp. 24 (quoting Pet. App. 29a-30a). But the first of these statements, which addressed a state-law challenge to the Act, cannot settle the federal constitutional question whether the Act takes property for a "public use." And there is no disagreement about the manner in which the tracks may spend the 40% of the money over which they have complete discretion: Because they may use it for activities they are already undertaking – "'to improve, maintain, market, and otherwise operate [their] racing facilities'" (Pet. App. 29a) – the funds go straight to the tracks' bottom line.

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In the
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., ET AL.,

PETITIONERS,

v.

ALEXI GIANNOULIAS, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a statute that forces an extraction of money from one group of precisely identified individuals and unalterably mandates its transfer to another group of precisely identified individuals violates the Takings Clause of the Constitution's Fifth Amendment, even if the money momentarily passes through the hands of government.

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Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,
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Cooper v. Aaron,
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Dane v. Jackson,
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Fletcher v. Peck,
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Hanover Shoe, Inc. v. United Shoe Machinery Corp.,
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Henderson Bridge Co. v. City of Henderson,
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Landgraf v. USI Film Prods.,
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Nixon v. Administrator of Gen. Servs.,
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Nixon v. Shrink Missouri Gov't PAC,
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Palazzolo v. Rhode Island,
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Pennsylvania Coal Co. v. Mahon,
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Thompson v. Consolidated Gas Utils. Corp.,
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U.S. Term Limits, Inc. v. Thornton,
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United States v. Brown,
381 U.S. 437 (1965) 7

United States v. Lovett,
328 U.S. 303 (1946) 8

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 10

Wilkinson v. Leland,
27 U.S. (2 Pet.) 627 (1829) 5

Zobel v. Williams,
457 U.S. 55 (1982) 8

Other Authorities

Fee, John.
The Takings Clause as a Comparative Right,
76 S. CAL. L. REV. 1003 (2003) 16

Hirschorn, Michael.
End Times, THE ATLANTIC, Jan./Feb. 2009 4

Hochman, Charles B.
The Supreme Court and the Constitutionality of Retroactive Legislation,
73 HARV. L. REV. 692 (1960) 8

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Illinois House Tr.,
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Illinois Senate Tr.,
94th Gen. Assemb., Reg. Sess.,
109th Legis. Day (May 4, 2006) 14

Kades, Eric.
Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application,
97 NW. U. L. REV. 189 (2002) 9, 16

Meltz, Robert.
Takings Law Today: A Primer for the Perplexed, 34 ECOLOGY L.Q. 307 (2007) 15

Peñalver, Eduardo Moisés.
Regulatory Takings,
104 COLUM. L. REV. 2182 (2004) 15

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Times Co. to Borrow Against Building,
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INTEREST OF *AMICUS CURIAE*[1]

The American Legislative Exchange Council ("ALEC") is the nation's largest bipartisan, individual membership association of state legislators. ALEC has approximately 2,000 members—nearly one-third of all state legislators in the United States. It serves to advance Jeffersonian principles of individual liberty, free and efficient markets, responsible and accountable government, and federalism.

ALEC and its members will be significantly affected by the disposition of this case. ALEC is particularly concerned by the practice of "predatory taxation," whereby state or local governments impose special tax burdens on particular targeted businesses. ALEC has addressed this problem in a variety of resolutions and model legislation opposing the levying of unfair taxes on politically disfavored industries or companies. In its *Statement of Principles on Local Tax Options*, ALEC has emphasized that one of the "[f]undamental principles of equitable tax policy" is that taxes must be "non-distortionary." Accordingly, ALEC's general view is that "[t]axes

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[1] All parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person, or entity (other than *amicus*, its counsel, or its members) made a monetary contribution intended to fund the preparation or submission of this brief. More than ten days prior to the due date, *amicus* provided counsel of record for all parties with notice of their intent to file this brief.

should be designed so that consumers and firms do not change their behavior to reduce their tax burden." Once the Pandora's Box of special interest pleading is opened, the forces let loose in the form of ever greater and more consequential favoritism can be difficult to tame.

Aside from the inequity to industries or businesses subjected to such non-neutral taxation, ALEC has recognized that predatory taxation may result in unconstitutional takings of private property. Accordingly, as a matter of constitutional principle and sound policy, ALEC believes that state and local governments should be required to exercise their taxing powers in a manner that respects private citizens' constitutional rights in property.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant review to correct the Illinois Supreme Court's decision below. The take-and-transfer regime adopted by the Illinois Legislature is a pristine example of the type of forced transfer of property from A to B that this Court has long regarded as unconstitutional. (*See* Section A, below). Nonetheless, the Illinois regime presented itself below clothed in "taxation" garb, and it ultimately proved a doctrinal riddle that the Illinois courts were not capable of solving. (*See* Section B, below). If the law governing A-to-B transfers disguised as "taxes" is not clarified, and the decision below is left uncorrected, the likely result will be a proliferation of unjust exactions of money predicated on nothing more than political expediency, raw power, and legislative logrolling. (*See* Section C, below). For the benefit of ALEC, its 2,000 members, and all state legislators nationwide, this Court should grant review and bring sorely needed clarity to what is now a confused area of law.

REASONS FOR GRANTING THE WRIT

ALEC respectfully submits that *certiorari* should be granted for the following reasons.

A. Take-And-Transfer Schemes Are Unconstitutional.

Consider the following hypothetical scenario. Congress becomes aware that, from sea to sea and in between, America's print newspapers are navigating desperate financial straits. The Hearst

media conglomerate is considering closing down its flagship *San Francisco Chronicle*. *See* Richard Pérez-Peña, *Hearst Threatens to End San Francisco Paper*, N.Y. TIMES, Feb. 24, 2009, at B9. The *Chicago Tribune* goes bankrupt. *See* Phil Rosenthal & Michael Oneal, *Tribune Files for Bankruptcy Protection*, CHICAGO TRIBUNE, Dec. 9, 2008. The *New York Times* looks to sell most or all of its non-media assets plus all or part of its Manhattan headquarters. *See* Richard Pérez-Peña, *Times Co. to Borrow Against Building*, N.Y. TIMES, Dec. 8, 2008, at B2. Print newspapers slide through an era of seemingly irreversible decline that is ascribed on all sides to a drain of readers and advertisers into internet-based "new media." Michael Hirschorn, *End Times*, THE ATLANTIC, Jan./Feb. 2009, at 41.

Congress hits upon a "solution." Congress recognizes that it need only take for newspapers' benefit a small percentage of the net assets of a few people who have profited handsomely from the rise of new media and information technologies—persons like William Gates III (Microsoft), Lawrence Ellison (Oracle), Michael Dell (Dell computers), Paul Allen (Microsoft), Sergey Brin (Google), Larry Page (Google), and Steve Ballmer (Microsoft). Congress recognizes that these seven individuals control, between them, an estimated $214 billion in assets. *See The Forbes 400*, FORBES, Sep. 17, 2008, *available at* www.forbes.com. Congress levies a special three percent "tax" on the assets of these magnificently rich seven individuals (projecting revenues of over $6 billion) and locks away the $6 billion in "tax" proceeds in a fund

specially set apart and dedicated to the financial relief of beleaguered newspapers. The three percent "tax," doled out to a roster of newspapers based on circulation, is projected to wipe out the entire operating deficits of those newspapers, granting the industry a new lease on life.

The newspaper relief regime described above unquestionably would be unconstitutional. Regardless of whether the seven affected individuals were identified by name or described to a certainty in some more roundabout manner, the regime's unconstitutionality could not be seriously doubted. It has been recognized from the dawn of the Republic, predating even the Fourteenth Amendment's ratification, that a legislature sits to make general laws, not to decide whether to take from A and give to B. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); *Wilkinson v. Leland*, 27 U.S. (2 Pet.), 627, 646 (1829) (Story, J.) ("[w]e know of no case in which a legislative act to transfer the property of A to B without his consent, has been held a constitutional exercise of legislative power").

The hypothetical newspaper relief constitutes an unabashed, unconstitutional A-to-B taking. Such take-and-transfer regimes are and remain unconstitutional notwithstanding the fact that, on its way from A to B, taken money may rest momentarily in the hands of "G," the government.

B. This Court Should Clarify The Contours Of The Doctrine Invalidating Take-and-Transfer Schemes.

The Illinois regime challenged below, like the hypothetical regime described above, is unconstitutional. This unconstitutionality arises from the lack of general applicability of the Illinois take-and-transfer law—as regards both the enumerated class it targets and the enumerated class it benefits—combined with the cast-in-stone nexus between its targets and beneficiaries.

The Illinois regime is no ordinary tax. Under ordinary taxation arrangements, a sovereign raises money for revenue-generating purposes and, once the money comes to rest in the hands of the government, that money becomes subject to allocation via the familiar push and pull of political decisionmaking. Illinois's regime, by contrast, exacts money solely for purposes of pre-directed transfer. The regime thus violates the *Calder v. Bull* principle: it is a naked, statutorily-mandated transfer from the pockets of Group A into the pockets of Group B, where the membership in both groups is effectively closed and the members of both groups can be pre-identified to a certainty by name.

The flagrancy of take-and-transfer constitutional violations of the type described above (and overlooked below) has led to confusion as to the source and dimensions of the constitutional doctrines forbidding them. The reasons for this confusion appear to be two-fold. *First*, take-and-transfer violations, like Illinois's casino-and-racetrack scheme, appear comparatively

infrequently in this Court's decisions. It may well be that this Court's early, unambiguous statements disapproving A-to-B transfers have had salutary effects in dissuading unconstitutional legislative behavior across the ensuing years. *Second*, and more importantly, the rule-of-law outrage committed below implicates foundational constitutional principles embodied in multiple constitutional provisions. The Court should grant review to clarify for the benefit of the lower courts the precise contours of these provisions.

The simple, powerful command that government may not force transfers of property (including money) between private parties is protected by an interconnecting web of constitutional doctrines. The Court has long held, for example, that Congress "must accomplish" its desired results "by rules of general applicability." *United States v. Brown*, 381 U.S. 437, 461 (1965). As Chief Justice Marshall noted almost 200 years ago, it is the "peculiar province of the legislature to prescribe *general rules* for the government of society," but the application of those rules to specific individuals is left to other departments of government. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) (emphasis added). Fundamental separation-of-powers principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation" on individuals or narrow groups of individuals. *See INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring). These bedrock principles are "expressed" both in the Constitution's "general allocation of power" and in

the Bill of Attainder Clause, *id.*, which prohibits imposing "punishment" on "easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946); U.S. Const. art. 1, § 10, cl. 1; *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977) (punitive "confiscation of property" violates rule against bills of attainder).

The Equal Protection and Due Process Clauses likewise play critical roles in precluding government action targeting disfavored groups or individuals. The familiar Due Process prohibitions on retroactive lawmaking, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994), can perhaps best be viewed as restrictions on legislating for the benefit or detriment of a class whose members can always in theory and often in practice be predetermined with certainty in advance. *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) ("another reason underlying the hostility to retroactive legislation is that such a statute may be passed with an exact knowledge of who may benefit from it"). Laws of particularized applicability that target specified groups for unfavorable treatment also trigger searching judicial scrutiny under the Equal Protection Clause. As this Court has recognized, "[w]hen a state distributes benefits unequally"—imposing burdens on some groups, but not others—the resulting distinctions are subject to equal protection scrutiny. *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

Most relevant here, the fundamental purpose of the Takings Clause is to defuse the enduring

problem of legislative targeting. As the Court has long recognized, the Takings Clause "was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). The Takings Clause therefore prohibits burdening "one or a relatively narrow subset of property owners" with the cost of "projects with much wider social benefits." Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 203 (2002) (discussing classical interpretations of the Takings Clause).

A vital principle that emerges from these related constitutional doctrines is that legislatures must act by general law, not targeted measures aimed at imposing special burdens on a specific group of enumerated individuals. The representative branches may and must raise general revenues for public purposes. What those branches may not do is single out precisely enumerated groups of disfavored citizens, take their property, and then transfer that property into the pockets of an equally precisely enumerated, but much more politically advantaged, group of fellow citizens.

Here, no one disputes that a three percent levy on all casino revenues, with the proceeds deposited into a general revenue account, could be constitutionally enacted by the Illinois Legislature. No one disputes that an equal amount of money

could be appropriated from general funds through ordinary legislative processes to benefit racetracks. What is plainly unconstitutional, however, is the bolted joinder of otherwise innocuous provisions into an holistic take-and-transfer scheme. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994) (taxation and monetary subsidy requirements, each of which would have been independently constitutional if enacted separately, held unconstitutional when combined).

Under this Court's authorities, the question remains whether this scheme violates the Due Process Clause or whether it violates the Takings Clause. *Compare Eastern Enters. v. Apfel*, 524 U.S. 498, 522-37 (1998) (plurality), *with id.* at 547-50 (Kennedy, J. concurring). Although the question is not free of doubt, in ALEC's judgment, a takings analysis provides an appropriate vehicle for recognizing the plain invalidity of Illinois's casino-to-racetrack take-and-transfer. The key to this doctrinal puzzle is recognizing that an impermissible A-to-B taking necessarily occurs where, as here, the individuals from whom money is taken and the individuals to whom money is bestowed are precisely enumerated and inextricably linked by law. This case is much like other cases where this Court has found provisions that would be permissible if enacted apart become unconstitutional when inextricably joined together. *See Healy*, 512 U.S. at 199.

One explanation for the Illinois courts' confusion may lie in the fact that the standard takings remedy differs from other constitutional remedies. Ordinarily, a finding that a taking has occurred

does not constitute an absolute prohibition, but only a conditional prohibition, on government action. The government may go forward and complete its contemplated action, but must pay "just compensation" in order to do so. The standard remedy for takings thus differs from the prohibitory injunctive remedies typically used to enforce other constitutional provisions.

Perhaps for this reason, the court below appeared to suggest that a forced payment of money can never constitute a taking because it purportedly does not involve an exercise of the State's "eminent domain powers." Pet. App. 24a; *see also id.* 26a (an "obligation to pay money" is not a "taking"). In the lower court's judgment, because the State was purporting to exercise its taxing authority, the Illinois take-and-transfer scheme was not subject to heightened scrutiny and any purported "public purpose" would be sufficient to justify the Legislature's action.

By drawing a rigid line that a government-enforced monetary exaction can never constitute a taking, the lower court eviscerated the Takings Clause and misread this Court's precedents. It cannot be seriously disputed that money is a form of property. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 490 (1968) (a "person whose property is diminished by a payment of money wrongfully induced is injured in his property"); *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("[m]oney is property"). Moreover, this Court's cases have long recognized that "one person's property may not be taken for the benefit

of another private person without a justifying public purpose, *even though compensation be paid.*" *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (emphasis added); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159 (1896).

Because paying monetary compensation for the taking of money would make no sense, purported "taxes" that are not embodied in generally applicable law should be subject, not only to the most exacting scrutiny, but also to prohibitory injunctive remedies. *See Eastern Enterprises*, 524 U.S. at 522 (plurality). Indeed, precisely because the Constitution "nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (citations omitted), any "tax" that purports to take money from one enumerated group of individuals for the benefit of another necessarily violates the Constitution.

C. State Legislators Need This Court's Guidance.

As state legislators, ALEC's members have both legal and practical reasons for seeking certainty regarding the scope of the constitutional prohibitions on A-to-B transfers. Legally speaking, the Constitution's Article VI binds state legislators by "Oath or Affirmation" to support the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). ALEC members accordingly have an urgent

need to obtain this Court's understanding of all of the relevant constitutional provisions that may apply to the States. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (recognizing incorporation of Takings Clause against the States); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Practically speaking, uncertainty about the constitutionality of legislation degrades the quality of legislative debate, by making it difficult for legislators to respect the rights of their constituents in cases where the scope of those rights is uncertain.

The legislative history of the law at issue in this case illustrates this difficulty. Legislators in both houses of the Illinois General Assembly spotted and emphasized the constitutional problems with the proposed casino "tax"—all to no avail.

For example, Representative Lang pointed out that the tax affected a taking and reminded his colleagues both of their legal duty not to pass unconstitutional legislation and of the potential practical consequences of costly litigation. *See Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 124th Legis. Day* (Apr. 26, 2006) (L. Lang) ("not only do we have bad public policy where we tax one industry to help another, but we have an unconstitutional taking."); *Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 128th Legis. Day* (May 4, 2006) (L. Lang) ("Ladies and Gentlemen, the Bill's unconstitutional."). Senators Petka, Link, and Cullerton also raised constitutional objections and similarly pointed to the practical consequences of unconstitutional legislation:

> We're just shifting money from one private group to another. ... [T]he two years that we put in the sunset are going to be taken up by a lawsuit, the Attorney General is going to have to defend it, if she doesn't want to, we'll have some private counsel come in and we'll spend state tax dollars, once again, to—trying to defend an unconstitutional law.

Illinois Senate Tr., 94th Gen. Assemb., Reg. Sess., 109th Legis. Day (May 4, 2006) (J. Cullerton). Had this Court's guidance been clearer, these objections more likely would have been recognized for what they are—unanswerable objections to the proposed legislation.

More troubling is the unusually well documented evidence of logrolling in the Illinois Legislature. The record shows that five of the nine riverboat casinos in Illinois were exempted from the tax and that these exemptions may have been granted for the purpose of obtaining the votes of legislators representing the home districts of those casinos. In response to questions about why certain representatives had changed their minds and votes regarding the casino-to-racetrack transfer, the main sponsor in the House of Representatives provided the following explanation:

> I talked to every Member who had boats down in Southern Illinois who told me, try to get an Amendment that takes my boat off. So there are about 10, 15 members that have boats in Southern Illinois that weren't for the Bill that may

> be for the Bill now and that's why you're seeing six or seven or eight changes.

See Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 124th Legis. Day (Apr. 26, 2006) (R. Molaro).

Absent a clearer statement from this Court regarding the unconstitutionality of disguised take-and-transfer regimes, ALEC fears that similar temptations to reward favored micro-constituencies will arise, persist, and prevail in far too many instances in far too many legislatures. If legislators come to expect that courts will turn a blind eye to take-and-transfer schemes, their natural proclivity toward logrolling will be deployed to fine tune the size and composition of legislatively-targeted and legislatively-benefited groups—to the point where our legislators become distracted and our laws become debased.

The lower courts are divided, as the petition points out, as to whether and under what circumstances money may be the subject of an unconstitutional taking. *See* Pet. 10-18. The scholarly commentary agrees that the law could stand a healthy dose of clarification. *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 328, 344 & nn.243-46 (2007) (the question whether and when government imposition of money liability is a taking is "not yet widely established in the case law" and "hardly settled law"); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2183 (2004) (noting "abiding puzzle[]" and "obvious tension between the rigor with which the Court scrutinizes regulations of property under the Takings Clause and the enormous deference it

displays toward the state's exercise of its power to tax"); John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1037-38 (2003) (the "law has struggled with the relationship between taxes and takings"); Kades, 97 NW. U. L. REV. at 190 (no one "has offered a coherent theory of the relationship between taxes and takings"). Indeed, this reigning confusion persists notwithstanding this Court's pronouncements that, in an appropriate case, a "tax" might well constitute an unconstitutional taking. *See Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 615 (1899); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *Dane v. Jackson*, 236 U.S. 589, 599 (1921); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916).

This case presents a type of egregious take-and-transfer scenario that this Court has occasionally hypothesized, but never squarely confronted: a discriminatory "tax" that takes money from one enumerated group; transfers it to another enumerated group; and inextricably binds the transfer to the taking. The case therefore provides a vehicle for affording legislators across the nation much-needed guidance on the constitutionality of such arrangements. For the benefit of ALEC, its approximately 2,000 members, and all legislators nationwide, the Court should take advantage of this vehicle and grant review.

CONCLUSION

For these reasons, the Court should grant review.

Respectfully submitted,

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IN THE
Supreme Court of the United States

EMPRESS CASINO JOLIET CORPORATION, ET AL.,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS STATE TREASURER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Illinois

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

If the government robs Peter to pay Paul, does it violate the Takings Clause?

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The Cato Institute respectfully submits that the petition for a writ of certiorari should be granted.*

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for private property, which lie at the very heart of the Fifth Amendment.

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* Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Cato Institute, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief by all parties have been submitted to the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Illinois statute at issue takes money from the private owners of certain riverboat casinos—only disfavored Chicagoland casinos—and gives it to the private owners of horseracing tracks, without even a brief stopover in the State's treasury.

One Illinois legislator aptly referred to the statute as "rob[bing] Peter to pay Paul." *See* Mar. 29, 2006 Transcript of House Debate on H.B. 1917 (statement of Rep. Beiser). In French and Spanish, the idiom is more tangible: "undress one saint to dress another." http://en.wikipedia.org/wiki/Robbing_Peter_to_pay_Paul. The Chinese have a similar expression: "dismantle the east wall to patch up the west wall." *Ibid.* And so does this Court: "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Kelo* v. *City of New London, Conn.*, 545 U.S. 469, 477 (2005).

Under the Fifth Amendment, it matters not if it is Peter's money, the first saint's clothes, the east wall owner's stones, or *A*'s property. None of these things can be taken by the government unless for public use, and then only if just compensation is paid. That rule does not change simply because the property transferred is money, contrary to the Illinois Supreme Court's holding in this case. *See* Pet. 18-26.

The Fifth Amendment's protections are "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49

(1960). The Illinois statute, however, is far afield from any public use this Court has ever recognized. Such approved uses include: use by the government; use by the public; use by common carriers; and use to combat blight. The statute also lacks characteristics, such as naming only an unspecified class of beneficiaries and being part of a comprehensive plan aimed at achieving a public purpose, that would give this Court confidence that its enactment was not simply a pretext for the award of private benefits. *Kelo*, 545 U.S. at 487.

The State's naked extraction of funds from Peter (the casinos) to pay Paul (the racetracks) does not comport with the Fifth Amendment's protections, and permitting this statute to stand would only encourage similar efforts by federal, state, and local governments to redistribute money and other property from less-favored to more-favored private entities. This Court should grant review to ensure that protection of private property interests—whether in money, clothes, stones, or otherwise—remains as robust as the Fifth Amendment requires.

REASON FOR GRANTING THE PETITION: THE ILLINOIS STATUTE VIOLATES THE "PUBLIC USE" REQUIREMENT

As petitioners explain, review is warranted to correct the Illinois Supreme Court's erroneous conclusion that the Fifth Amendment's prohibitions on the uncompensated taking of "private property" are limited to the state's exercise of eminent domain and do not extend to the extraction of money. Pet. 18-26.

The forced transfer of tangible or intangible property (for example, real estate, fixtures, or trademarks) from the casinos to the racetracks would clearly be subject to constitutional challenge as an

uncompensated taking. *See, e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (affirming the "traditional rule that a permanent physical occupation of property is a taking"). The Illinois Supreme Court's exclusion of monetary exactions from takings challenges strips the Fifth Amendment's protections from a State's forced conveyance of a private party's cash having exactly the same practical impact as if the State had transferred an equivalent amount of other property.

The Illinois Supreme Court's decision also warrants review because the exaction here does not satisfy the "public use" requirement of the Takings Clause. *See* Pet. 28-29 & n.15. As petitioners explain, the Illinois statute's "award of benefits is so skewed to the advantage of private interests that it does not satisfy the Fifth Amendment's public use requirement." *Id.* at 28. The state supreme court, however, "never reached the 'public use' issue" because of its erroneous conclusion excluding monetary exactions from takings challenges. *Id.* at 8.

"[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937); *see also, e.g.*, *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908) ("it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses"); *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth

article of amendment of the constitution of the United States").

The public use requirement is one of the most ancient limitations on government power in this country. At the time of the Founding, this Court unequivocally explained that "a law that takes property from A. and gives it to B." would be "against all reason and justice." *Calder* v. *Bull*, 3 U.S. 386, 388 (1798). More than two centuries later, the Court reiterated that "the sovereign may not take the property of *A* for the sole purposes of transferring it to another private party *B*." *Kelo*, 545 U.S. at 477. The Illinois legislation runs smack into this time-honored prohibition.

The Court's public use jurisprudence has "wisely eschewed rigid formulas," *Kelo*, 545 U.S. at 483, recognizing that "what is a public use frequently and largely depends upon the acts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned," *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 159-60 (1896). Although this jurisprudence reflects a general "policy of deference to legislative judgments in this field," *Kelo*, 545 U.S. at 480, whether a particular exaction meets the public use requirement is, ultimately, a judicial determination. *See, e.g., City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *Hairston*, 208 U.S. at 606.

The Illinois statute requires all casinos with adjusted gross receipts (AGR) above $200 million in 2004—in practice the four Chicago-area casinos—pay 3 percent of their AGR into the "Horse Racing Equity Trust Fund." 230 ILCS 10/7(a), Pet. App. 60a. This fund is a "non-appropriated trust fund held separate and apart from State moneys." 230 ILCS 5/54.5(a),

Pet. App. 57a. The fund is divided into two categories. Sixty percent of the proceeds are distributed to the racetracks as purses. 230 ILCS 5/54.5(b)(1), Pet. App. 57a-58a. The remaining 40 percent of the proceeds are distributed directly to the racetracks as an operating subsidy. 230 ILCS 5/54.5(b)(2)(B), Pet. App. 58a. The statute provides no meaningful restriction on the use of the subsidy, requiring only that it be used "to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvement related to live racing and the backstretch." 230 ILCS 5/54.5(b)(2)(B), Pet. App. 59a.

This statute does not remotely fit into or even resemble any of the general categories of permissible public uses recognized by this Court:

Property used by the government. It is well-settled that the government may take private property for its own use in carrying out its governmental functions. For example, after the Civil War, the Court upheld the federal government's condemnation of portions of the Gettysburg battlefield for placement of publicly owned monuments and tablets. *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681-82 (1896). The Court declared that the government's taking of property for its own activities was presumptively public use. *Id.* at 680; *see also, e.g.*, *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 66 (1925) (upholding the exercise of eminent domain over land to be used for military purposes). The public character of governmental use of property is rarely in doubt: the government owns the property and occupies it to perform governmental func-

tions, which are presumptively for the benefit of the public.

Property used by the public. The government may take property to build highways, roads, public parks, and other public facilities to which the general public has a right of access. Indeed, this was the original conception of the term "public use"—that the general public was entitled to use, in a physical sense, the property in question. *See, e.g., Kelo*, 545 U.S. at 508-11 (Thomas, J., dissenting). This Court has upheld many takings of this kind. For example, in *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923), the Court upheld as a public use the taking of land on a private ranch that was needed to construct a public road "as a way of convenience or necessity for public use and travel." *Id.* at 706; *see also United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551-52 (1946) (upholding condemnation of private property for transfer to the National Park Service as part of the Great Smoky Mountains National Park).

Property used by common carriers. The government may take private property for common carriers or companies operating under the legal obligations of common carriers to lay railroads, deploy power or cable TV lines, or provide other services to the public. *See, e.g., National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992) (taking of railroad track for use by Amtrak); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (taking of land and water rights by Alabama Interstate Power Company); *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885) (taking of upstream property flooded by grist mill "which grinds for all comers, at tolls fixed by law").

Property used to combat blight. The government may take property to clear blighted buildings or slums that create public health and safety hazards. In *Berman* v. *Parker*, 348 U.S. 26 (1954), the Court upheld the federal government's attempt to acquire and redevelop a blighted area in the District of Columbia, reasoning that the removal of blight was a "public use" because blighted property endangered the public welfare. Although the *Berman* Court permitted a non-blighted department store to be taken as part of the project, the Court emphasized that this was essential to achieving the public purpose of "eliminat[ing] the conditions that cause slums." 348 U.S. at 34.

The funds exacted from the casinos under the Illinois statute, however, are not used by the government, by the public, or by common carriers. Nor does their transfer remove blight or otherwise further the public welfare.

The statute does not even fall within the unprecedently broad understanding of the public use requirement supplied by this Court in *Kelo*, which permitted the exercise of eminent domain in furtherance of "economic development." 545 U.S. at 489-90. Importantly, although "the government's pursuit of a public purpose will often benefit individual private parties," *id.* at 485, the ultimate beneficiaries of the taking in *Kelo* were unknown, *id.* at 478 n.6 ("It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown"). And the taking was executed as part of an "integrated development plan." *Id.* at 487.

Although *amicus* continues to believe that *Kelo* was wrongly decided, the salient characteristics of

the government action there at least shared some similarities with other broadly defined "public uses" recognized by the Court. For example, in *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 232 (2003), the Court found that funds taken from IOLTA accounts to provide legal services to "literally millions of needy Americans" qualifies as a public use. Similarly, in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1015 (1984), the Court found that Congress may validly take proprietary data from applicants for registration to serve a "procompetitive purpose." In neither of these cases could the beneficiary of the taking be identified with particularity.

The Illinois statute, by contrast, lacks these characteristics and, to put it mildly, "raise[s] a suspicion that a private purpose is afoot." *Kelo*, 545 U.S. at 487. The statute simply transfers funds from one private entity to another—from the casinos to the racetracks—with minimal state involvement, and with little restriction on the use of the funds received. Moreover, the statute's private beneficiaries (the racetracks) are identified by the legislation, as are the private entities from whom the funds are to be taken (the casinos). And the statute hardly sets up a comprehensive plan for encouraging economic development in the Illinois horseracing industry, other than that the transferred funds themselves can be used to line the pockets of the current racetrack owners.

Although the Act purports to "address the negative impact riverboat gaming has had" on Illinois horseracing, Public Act 94-0804, § 1(5), Pet. App. 57a, the lack of meaningful restrictions on the use of funds creates an incentive for track operators to use the money to finance their ordinary expenses (or

some other parochial business purpose). Because the tracks are not obligated to undertake new projects or maintain pre-subsidy levels of investment or working capital in their operations, the subsidies could boost profits and go straight to the racetracks' bottom lines. The Illinois Racing Board monitors only the distribution of the funds, not how they are ultimately spent. 230 ILCS 5/54.5(c), Pet. App. 59a. Such outcomes do little, if anything, to meet the statute's purported goals.

The Fifth Amendment demands more than a mere legislative declaration that a particular exaction serves a public purpose. Although this Court grants some deference to legislative judgments, those judgments cannot stand if they are made "'without reasonable foundation.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Gettysburg Electric Ry. Co.*, 160 U.S. at 680). The taking of property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," lacks such foundation. *Kelo*, 545 U.S. at 478.

The private-to-private transfer effected by this Illinois statute circumvents the standard political checks and balances associated with the burdens borne by private entities. "[N]othing opens the door to arbitrary action so effectively as to allow [public] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-13 (1949); *see also County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1880) (distinguishing takings from taxation). These political checks also operate to minimize the types of

serious questions that have been raised about the involvement of private interests in the passage of the identical successor to Illinois statute at issue here. *See* Pet. 31.

* * *

When Paul is politically powerful or popular, the government will always have an incentive to pick Peter's pocket for Paul's private purposes. The Takings Clause—including its "public use" requirement—stands as a constitutional bulwark against such official extortion. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) ("it prevents the public from loading upon one individual more than his just share of the burdens of government"). Yet the decision below, if left uncorrected, would only encourage governments to exact funds from one private sector for the exclusive benefit of another—taking stones from the east wall to rebuild the west.

The national and world economies are experiencing a period of volatility that could lead to more government-mandated transfers of wealth. In such times, the stalwart defense of our constitutional liberties assumes even greater significance. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change") (citation omitted). Where, as here, no legitimate public use is furthered, robbing Peter to pay Paul violates the Takings Clause.

The Illinois Supreme Court's decision transgresses the economic liberties at the core of the Fifth Amendment, and that transgression should be reviewed and corrected by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASSN., NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASSN.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89 (1995) 14

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David A. Dana & Thomas W. Merrill, *Property: Takings* (2002) 10

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Herbert Hovenkamp, *Legislation, Well-Being and Public Choice,* 57 U. Chi. L. Rev. 63 (Winter 1990) 16

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interest of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has filed *amicus* briefs in other Takings Clause cases and is well situated to address the issues raised in this case. The Chamber has a strong interest in the constitutional protection of the property rights of its members. The question presented by the instant case – whether a state's expropriation of money from a company for purposes of subsidizing a competitor constitutes a "taking" under

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of *amicus's* intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the Takings Clause of the Fifth Amendment – is of great concern to all Chamber members. The Chamber vigorously disagrees with the holding of the Illinois Supreme Court that "regulatory actions requiring the payment of money are not takings." Pet. App. 25a. The Chamber believes that money represents a quintessential form of property and should be protected by the Takings Clause just as much as other forms of property.

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court's unequivocal holding that the Takings Clause applies "only to the state's exercise of eminent domain" and that "regulatory actions requiring the payment of money are not takings" conflicts with this Court's Takings jurisprudence, is inconsistent with the broad meaning of "private property" intended by the Framers, and invites all manner of legislative mischief.

For over 200 years, this Court has emphasized that "a law that takes property from A, and gives it to B" violates the Takings Clause. *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798); *Kelo v. City of New London*, 545 U.S. 469, 477 and n. 5 (2005). This case represents the paradigm of just such a taking – the Illinois Act upheld by the Illinois Supreme Court takes tens of millions of dollars away from the four largest-grossing casinos in Illinois, and gives those monies as a subsidy to the horse-racing tracks with

which the casinos compete. The Act impermissibly singles out the casinos as the source of financial support for the financially flagging but politically influential horse-racing industry. This plainly runs afoul of this Court's teaching that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Illinois Supreme Court's reliance on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1995), for the notion that money does not constitute "private property" under the Takings Clause was misplaced, as the various opinions by the divided Court in that case did not yield any such holding. Moreover, the Illinois Supreme Court disregarded other opinions by this Court in which it has recognized that the reach of the Takings Clause extends beyond the exercise of eminent domain power, and also encompasses within its ambit a purely monetary appropriation. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

The petitioners have demonstrated that the fractured decision in *Eastern Enterprises* has engendered a welter of conflicting opinions in the courts below that has widened a split among them over the important and recurring issue of whether an appropriation of a person's money can constitute a taking under the Fifth Amendment. The Chamber agrees

with petitioners that this case presents an ideal vehicle to resolve that persistent conflict and provide guidance to both the lower courts and to state and local governments that may seek to emulate what Illinois has done. If the Illinois Act is allowed to stand, state and local governments now confronted by staggering deficits and budget shortfalls may well decide that they too can appropriate money from certain successful businesses in order to subsidize struggling but politically powerful competitors. It has long been recognized that the Takings Clause was intended to prevent those who are politically influential from utilizing the levers of government to appropriate property from those who are unpopular or politically weaker. *See, e.g.*, *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) ("Together [the public use and just compensation requirements] ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power -- particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.").

The Chamber urges this Court to grant the Petition.

ARGUMENT

A. The Illinois Supreme Court's Ruling Conflicts with This Court's Precedents and the Broad Meaning of "Private Property" Intended by the Framers

Over two hundred years ago, this Court held that "a law that takes property from A, and gives it to B" "cannot be considered a rightful exercise of legislative authority"; "[i]t is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798). This longstanding bedrock principle of constitutional law was recently reaffirmed by this Court in *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("the sovereign may not take the property of A for the sole purpose of transferring it to another private party B").

The Illinois Act at issue here does precisely what this Court has long declared forbidden – it expropriates from four Chicago-area casinos 3% of their adjusted gross receipts, and transfers those monies to their competitors, a politically-favored group of horse-racing tracks. This legislation simply cannot pass muster under the Takings Clause, which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his

neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (citations omitted).

The Illinois Supreme Court rejected petitioners' constitutional challenge to the Act, holding that the Takings Clause applies "only to the state's exercise of eminent domain" and "regulatory actions requiring the payment of money are not takings." Pet. App. 21a, 25a. This conclusion is inconsistent with this Court's precedents and the broad meaning of "private property" intended by the Framers of the Constitution.

1. As petitioners have explained, the Illinois Supreme Court's heavy reliance on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), was entirely misplaced. There was no majority opinion in *Eastern Enterprises*, and therefore it cannot be relied upon as controlling precedent for the proposition that "regulatory actions requiring the payment of money are not takings." Pet. App. 25a. The opinion by Justice Breyer expressing the view that "an ordinary liability to pay money" does not constitute a taking (524 U.S. at 554) represented the **dissenting** opinion, and it was plainly erroneous for the Illinois Supreme Court to treat it as controlling by virtue of the concurring opinion by Justice Kennedy, who found that the Act at issue was unconstitutional on due process grounds. Neither the dissenting opinion nor the four-Justice plurality opinion, which concluded that the required

payment of health care benefits "effect[ed] an unconstitutional taking" (*id.* at 504), represents the holding of this Court.[2]

This Court has instructed that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). However, the *Marks* rule is applicable only where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994) (quoting *King v. Palmer,* 292 U.S. App. D.C. 362, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992)). Thus, in cases such as *Eastern Enterprises*, where approaches fundamentally differ,

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[2] It also is noteworthy that, in *Eastern Enterprises*, both the concurring opinion by Justice Kennedy and the dissenting opinion by Justice Breyer acknowledged that prior Court precedents lent support to the plurality's Takings Clause analysis. *See* 524 U.S. at 545 (Kennedy, J., concurring) ("It should be acknowledged that there are passages in some of our cases on the imposition of retroactive liability for an employer's withdrawal from a pension plan which might give some support to the plurality's discussion of the Takings Clause."); *id.* at 555 (Breyer, J., dissenting) ("The Court in two cases has arguably acted *as if* the Takings Clause might apply to the creation of a general liability.") (italics in original).

no particular standard is binding on an inferior court because none has received the support of a majority of this Court. *Rappa*, 18 F.3d at 1058. *See also Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that a plurality view that does not command a majority is not binding precedent); *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910) ("The principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts").

The Illinois Supreme Court erred not only in its reliance upon the dissenting opinion in *Eastern Enterprises*, but also by ignoring precedents of this Court which have recognized that a purely monetary appropriation is subject to Takings Clause analysis. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held that a Florida law appropriating the interest earned on an interpleader fund deposited in the court registry violated the Takings Clause. The Court recognized that "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. Indeed, "appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property . . . " *Id.* at 163-64.

Thereafter, in *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), this Court relied on *Webb's* to hold that interest income generated by principal held in IOLTA accounts is the private property of the owner

of the principal for purposes of the Takings Clause. The Court emphasized that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 172. Similarly, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), this Court recognized that "[a] law that requires that the interest on [client funds] be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client." *Id.* at 240.

In the tax context, this Court has likewise recognized that money constitutes a property interest. In *Dickman v. Commissioner*, 465 U.S. 330, 336-37 (1984), the Court stated as follows:

> We have little difficulty accepting the theory that the use of valuable property – in this case money – is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly:
>
> > 'Property' is more than just the physical thing – the land, the bricks, the mortar – it is also the sum of all of the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. . .
>
> * * *
>
> What was transferred here was the use of a substantial amount of cash for an indefinite period of time. An analogous interest in real

> property, the use under a tenancy at will, has long been recognized as a property right. . . For example, a parent who grants to a child the rent-free, indefinite use of commercial property having a reasonable rental value of $8,000 a month has clearly transferred a valuable property right. The transfer of $100,000 in cash, interest-free and repayable on demand, is similarly a grant of the use of valuable property. Its uncertain tenure may reduce its value, but it does not undermine its status as property. In either instance, when the property owner transfers to another the right to use the object, an identifiable property interest has clearly changed hands.

2. This Court's decisions recognizing that money is a form of property that is protected by the Fifth Amendment comport with the intent of the Framers. The author of the Takings Clause was James Madison, and therefore his understanding of its terms has special significance.[3]

The Framers of the Constitution, with Madison at the helm, assumed the existence of property as a constitutional institution and, further, had a very broad view of the resources that the term "property" protected. It certainly protected those resources such

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[3] David A. Dana & Thomas W. Merrill, *Property: Takings* 13 (2002); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 791 (1995).

as land and goods that traded in the marketplace, but it also protected facultative resources. Madison's view is instructive:

> Property. The term in its particular application means that "dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or **money** is called his **property**.

James Madison, *Property*, *The Nat'l Gazette, Mar. 29, 1792, reprinted in 6 The Writings of James Madison*, 101 (Gaillard Hunt ed., 1906) (emphasis added).

In the Federalist Papers, Madison emphasizes that "the protection of these faculties (the different and unequal faculties for acquiring property) is the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). Gouverneur Morris, the Framer who, after Madison, spoke most often at the Convention, also held the view that property "was the main object of society." *The Records of the Federal Convention of 1787*, at 533 (Max Farrand ed., 2d ed., 1937). For Madison, "government is instituted to protect property **of every sort**." James Madison, *Property, The Nat'l Gazette, Mar. 27, 1792, reprinted in 14 The Papers of James Madison* at 266 (Robert A. Rutland ed., 1983) (emphasis added). Madison's expansive view of

property rights cannot be reconciled with a government of social transformation empowered to redistribute property from one business to another according to the reasons of the day.

The idea that protection of property is the motivating force of men entering into society dates back at least to Locke: "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government is the Preservation of their Property." John Locke, *Two Treatises of Government* 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Locke's use of the word "property" was meant to convey more than just ownership of realty or chattel; he wrote that he called "Lives, Liberty and Estates . . . by the general Name, Property." *Id.* at 368. *See also* Adam Smith, *An Inquiry into the Wealth of Nations* 670 (Edwin Cannan ed., Modern Library 1937) (1776) ("The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary.").

Property rights were central to the Framers' understanding of the liberties secured by the Constitution: they supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990); *see also* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional*

History of Property Rights 42-58 (1992). The Framers saw the protection of property rights as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). They recognized, in the words of John Adams, that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila, reprinted in 6 The Works of John Adams, Second President of the United States* 221, 280 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851). Knowing that "[g]overnment is instituted no less for protection of the property than of the persons of individuals" (*The Federalist No. 54,* at 339 (James Madison) (Clinton Rossiter ed., 1961)), the Framers deliberately sought to shield interests in property – no less than in life and liberty – from government intrusion. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946.

This Court, too, has long recognized that the protection of property rights is "a vital principle of republican institutions." *Chicago, B. & O. R.R. v. City of Chicago*, 166 U.S. 226, 235-236 (1897). Finding that "the dichotomy between personal liberties and property rights is a false one," the Court has confirmed that "rights in property are basic civil rights." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Rights in property are not secondary to rights to liberty because, as the Court explained in *Lynch*, "a fundamental interdependence exists between the personal right to liberty and the personal right in property," and "[n]either could have meaning without the other." *Id.*

B. The Illinois Supreme Court's Ruling Further Deepens a Conflict in the Courts Below

For many years, the lower courts have struggled with the difficult question of whether the Framers intended the Takings Clause to apply to expropriations of money. As demonstrated by petitioners, the substantial doctrinal confusion in this area has been exacerbated by the fractured decision in *Eastern Enterprises*, which has spawned additional conflicts in the courts below. (Petition at 10-14). Numerous courts and commentators have repeatedly bemoaned the confusion and uncertainty in this area of the law. As Justice Stevens has remarked, "even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). *See also Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 394 (1995) (Kennard, J., concurring) ("Legal commentators have long described takings law 'as a field of doctrinal incoherence littered with differing and inconsistent rationales.'"); Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 1-2 (2003) (calling takings law "famously incoherent"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Comment. 279 (1992) ("Takings doctrine is a mess."); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158, 2169-70 (2002) (likening attempts to interpret the Takings Clause to the "physicist's hunt" for the elusive quark); J. Peter Byrne, *Ten Arguments*

for the Abolition of the Regulatory Takings Doctrine, 22 Ecology L.Q. 89, 102 (1995) (describing the takings doctrine as "an unworkable muddle").

This case presents an excellent opportunity for the Court to clarify an enormously important issue of constitutional law which has profound consequences not only for the parties involved, but also for governments and business entities nationwide. The discrete legal question is squarely presented by the Illinois Supreme Court's unequivocal holding that the Takings Clause applies "only to the state's exercise of eminent domain." Pet. App. 21a. This case does not involve the government's appropriation of money to satisfy an obligation to the government or a third party. Moreover, as explained in the Petition (pp. 26-30), the Act does not represent an exercise of the State's taxing powers. In short, unlike *Eastern Enterprises*, this case does not "bristle[ ] with conceptual difficulties." 524 U.S. at 556 (Breyer, J., dissenting).

C. The Illinois Supreme Court's Ruling Invites Substantial Legislative Mischief

It has long been recognized that one of the fundamental purposes of the Takings Clause is to prevent those who are politically powerful from exploiting that advantage in the legislative process to expropriate property from those who are politically vulnerable. *See, e.g.*, *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) ("Together [the public use and just compensation requirements] ensure stable property

ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Policy 491, 547 (Spring 2006) ("One enduring concern surrounding the Takings Clause has been the risk of 'majoritarian oppression:' that is, abuse of the political process by a powerful majority that exerts sufficient control over the government such that it can co-opt the eminent domain power to confiscate the property of a less powerful minority"); Herbert Hovenkamp, *Legislation, Well-Being and Public Choice*, 57 U. Chi. L. Rev. 63, 87 (Winter 1990) (noting the importance of takings law in "limiting the power of legislatures to grant favors to politically powerful interest groups," and to prevent "[t]he victims of takings" from being "legislatively robbed"); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. L. & Econ. 125, 137 (1992) ("The takings clause can be defended as a barrier against a serious form of discrimination against politically disfavored groups."); Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 310-11 (1990) (arguing that takings law does and should protect those who are particularly vulnerable in political process).

The Act at issue in this case takes tens of millions of dollars away from the four largest-grossing casinos and bestows those monies on the racetracks, with whom they compete. It is a redistribution of wealth, pure and simple, and plainly violates the Takings Clause's core underlying principle that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." *Kelo*, 545 U.S. at 477. Not only is the Act the result of the racetrack owners' exercise of their political clout with the Legislature and the now-impeached Governor, it has also been alleged by the U.S. Attorney that renewal of the 3% surcharge that the former Governor signed into law in December 2008 was a part of an illegal "pay-to-play" scheme. *See* Petition at p. 6 n. 3. This type of corrupt political environment makes it all the more important that the politically disadvantaged entities whose monies are being taken away from them to subsidize their well-connected competitors be afforded protection by the courts under the Fifth Amendment.

If Illinois is allowed to compel certain of its casinos to transfer tens of millions of dollars in revenues to their less successful racetrack competitors, then any other state or local government would be free to follow suit. In this very difficult economic environment, countless businesses are looking for assistance and bailouts to weather the storm, and state and local politicians will be all too happy to act as "Robin Hood" to redistribute the wealth from successful but politically unpopular businesses to

more politically well-connected competitors. One can envision legislation requiring large banking institutions to pay over millions of dollars to smaller, local banks that are in dire straits; or requiring a large home supply chain to pay 5% of its revenues to subsidize unprofitable local hardware stores; or requiring large supermarket chains to pay 10% of their revenues to subsidize struggling local grocers; or requiring national "big-box" retailers to pay 15% of their revenues to subsidize scuffling local Mom-and-Pop stores. A legislature could decide that "factory farms" should transfer 15% of their revenues to competing "family" farms. If no constitutional constraints are imposed on the ability of state and local governments to rob Peter to pay Paul, all manner of legislative mischief may ensue.

This Court should grant certiorari to reaffirm its longstanding commitment to the principle that, under the Takings Clause, the Government is barred from singling out certain persons to pay for the misfortunes of others. As this Court has emphasized, the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

———♦———

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 27, 2009

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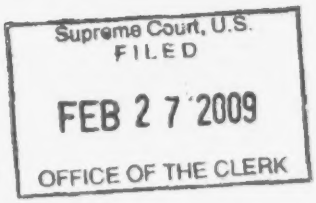

No. 08-945

IN THE

Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTENRSHIP, HOLLYWOOD CASINO-AURORA, INC. AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC. HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N,

Respondents.

On a Petition for Writ of Certiorari to
The Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ALLANCE FOR GROWTH, AMERICANS FOR TAX REFORM IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the Illinois Alliance for Growth ("Alliance") moves for leave to file the attached brief *amicus curiae.*[1]

The Illinois Alliance for Growth, Inc. is a non-profit public policy research and advocacy

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[1] Counsel for petitioners has issued a 'blanket consent' to filing of amici curiae briefs and a copy of that consent has been filed with the Clerk.

Counsel for respondent Alexi Giannoulias, Treasurer of the State of Illinois, and the Illinois Racing Board, represented by the Attorney General of the State of Illinois, has also issued a 'blanket consent' to the filing of amici curiae briefs and a copy of that consent has been filed with the Clerk.

Counsel Lawrence Weiner, for respondent Illinois Harness Horsemen's Association has consented to the filing of this brief, and a copy of that consent has been filed with the Clerk.

Counsel for respondent Balmoral Park Trot, Inc., William J. McKenna, has verbally consented to the filing of this brief as of February 24, 2009, but as of February 26 written notice had not yet been received to file with the Clerk.

Counsel for respondents Hawthorne Race Course, Inc., Maywood Park Trotting Association, National Jockey Club, and the Illinois Horsemen's Association, consent nor objection had been received by *Amici* as of February 26, 2009.

All of the aforesaid Counsel were provided timely notice of intent to file an Amicus Brief in Support of Petitioner's Writ of Certiorari, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States.

organization based in Springfield, Illinois. Its mission since formation in 2008 has included promoting a stable and predictable climate for investment, which is generally considered a critical predicate for economic growth, as well as low rates of public expenditures and taxation. These interests are compromised in several respects when a public body imposes a new assessment on a class of business establishments already licensed by the State of Illinois, especially when the proceeds of the surcharge it imposes are diverted to subsidize their theoretical competitors. This is the first time it has participated as *amicus curiae* before this Court.

Americans for Tax Reform (ATR) is a nonprofit taxpayer advocacy organization based in Washington, D.C. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today.

The government's power to control one's life derives from its power to tax. ATR believes that power should be minimized. It is in this mission that ATR opposed the surcharge upon receipts on four Illinois gaming establishments. Furthermore, ATR was also opposed to the confiscatory nature of the surcharge. The only thing worse than an onerous tax increase during a recession is one in which revenue derived from that tax is then passed to another private entity, making it akin to eminent domain abuse. Lastly, ATR believes such policies create a breeding ground for corruption and government waste. ATR has recently participated as *amicus curiae* before this Court in Cable News

Network v. CSC Holdings, Inc., and Cablevision Systems Corp. (No 08-448).

Amici believe that a taking has occurred when the legislature requires not only the payment of a new surcharge upon receipts, but also the transfer of the monies generated by it to their competitors. Major capital investment decisions are based upon long-term expectations and the terms prevailing at the time. While an increase in the existing rates of taxation over time may be foreseeable, the creation of an entirely new surcharge upon receipts constitutes a confiscatory change in material terms.

In particular, *Amici* believes that the allocation of the nominally public revenues generated by the surcharge to competing enterprises is not an application "of the authority to raise revenues for public purposes" (*Alaska Fish Salting & By-Products Co. v. Smith,* 255 U.S. 44, 65 L.Ed. 489, 41 S. Ct. 219 (1921)) entitled to the deference accorded taxation; but rather, serves primarily private interests. While "the Due Process Clause of the 5th Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 Led. 493, 504 (1916)) nor of the several states, employment of the coercive powers of the State of Illinois to collect a daily surcharge upon receipts does not render it a tax serving public purposes merely because it passes through a state agency for its allocation. Indeed, the daily collection, allocation and distribution within ten days imposes an accounting and administrative

distribution burden upon publicly-funded entities for which the State receives no benefit.

While Federal Courts have recognized that the payment of money under tax laws "are not treated as per se takings," (*Branch v. U.S.*, 69 F. 3d 1571, 1576 (Fed. Cir. 1995)), the fact that it has been necessary to review the relationship between monetary assessments and the purpose they allegedly serve suggests that a percentage assessment upon the receipts of an enterprise is not entitled to the deference accorded a tax when the full amount of funds are transferred to private parties—together with the interest earned from the first day of its transfer, within only ten days of collection.

Moreover, because all the monies generated are transferred to the licensees' competitors based upon a formula which denies the Illinois Racing Board any discretion to approve, deny or even modify how the monies are used by recipient private interests, this legislative allocation constitutes "impermissible favoritism" toward "private parties" justifying "a more stringent standard of review" by the Courts. (*Kelo v. City New London,* 545 U.S. 469 (2005)).

Amici further believe they possess a unique expertise on the public policies at issue, and a perspective on the legislative process in Illinois, in addition to information not then known to the Illinois Supreme Court when it denied a rehearing to petitioners. Given both the Alliance and ATR's interest in protection of private property rights, and in Takings Clause jurisprudence, *amici* believe that

their perspective regarding the need to subject this taking to a more stringent review under the Public Use Clause than the rational-basis standard will be useful to the Court.

Amici thus request this Court grant its motion for leave to file the attached brief amicus curiae in support of petitioner.

Respectfully, Submitted,

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QUESTION PRESENTED

In this case, the Illinois Supreme Court held that a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks is categorically not susceptible to challenge under the Takings Clause of the Fifth Amendment because, in that court's view, "regulatory actions requiring the payment of money are not takings." The question presented is:

Whether the State's taking of money from private parties is wholly outside the scope of the Takings Clause.

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BRIEF OF AMICI CURIAE OF THE ILLINOIS ALLAINCE FOR GROWTH, INC. & OF AMERICANS FOR TAX REFORM

INTEREST OF THE AMICI CURIAE[1]

Both of the above *amici* are non-profit organizations which have, as one of their prime public policy objectives, the protection of private property rights. They are therefore all keenly interested in the outcome of this case. The *amici* are:

Illinois Alliance for Growth, Inc. (the "Alliance") is a non-profit public policy research and advocacy organization based in Springfield, Illinois. The Illinois Alliance for Growth has a strong interest in promoting a stable and predictable climate for investment, which is generally considered a critical predicate for economic growth. This interest is compromised by a surcharge upon receipts which accomplishes the confiscation of the earnings of four gaming establishments already licensed by the State of Illinois, thereby reducing their market advantage against their closest competitors within the sub-

[1] Pursuant to Rule 37.3, the parties have consented to the filing of its brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

sector, especially when the proceeds of the surcharge upon receipts are diverted by the State to subsidize their theoretical competitors.

Americans for Tax Reform (ATR) is a nonprofit taxpayer advocacy organization based in Washington, D.C. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today.

The government's power to control one's life derives from its power to tax. We believe that power should be minimized. It is in this mission that ATR opposed the surcharge upon receipts on four Illinois gaming establishments. Furthermore, ATR was also opposed to the confiscatory nature of the surcharge upon receipts. The only thing worse than an onerous tax increase during a recession is one in which revenue derived from that tax is then passed to another private entity, making it akin to eminent domain abuse. Lastly, ATR believes such policies create a breeding ground for corruption and government waste.

SUMMARY OF ARGUMENT

The Illinois Alliance for Growth, Inc. is a non-profit public policy research and advocacy organization based in Springfield, Illinois. Its mission since formation in 2008 has included promoting a stable as well as predictable climate for investment, which is generally considered a critical predicate for economic growth, and low rates of

public expenditures and taxation. These interests are compromised in several respects when a public body imposes a new assessment on a class of business establishments already licensed by the State of Illinois, especially when the proceeds of the surcharge it imposes are diverted to subsidize their theoretical competitors. This is the first time it has participated as *amicus curiae* before this Court.

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Amici believe that a taking has occurred when the legislature requires not only the payment of a

new surcharge upon receipts, but also the transfer of the monies generated by it to their competitors. Major capital investment decisions are based upon long-term expectations and the terms prevailing at the time. While an increase in the existing rates of taxation over time may be foreseeable, the creation of an entirely new surcharge upon receipts constitutes a confiscatory change in material terms.

In particular, *Amici* believes that the allocation of the nominally public revenues generated by the surcharge to competing enterprises is not an application "of the authority to raise revenues for public purposes" (*Alaska Fish Salting & By-Products Co. v. Smith,* 255 U.S. 44, 65 L.Ed. 489, 41 S. Ct. 219 (1921)) entitled to the deference accorded taxation; but rather, serves primarily private interests. While "the Due Process Clause of the 5th Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 Led. 493, 504 (1916)) nor of the several states, employment of the coercive powers of the State of Illinois to collect a daily surcharge upon receipts does not render it a tax serving public purposes merely because it passes through a state agency for its allocation. Indeed, the daily collection, allocation and distribution within ten days imposes an accounting and administrative distribution burden upon publicly-funded entities for which the State receives no benefit.

While Federal Courts have recognized that the payment of money under tax laws "are not treated as per se takings," (*Branch v. U.S.*, 69 F. 3d 1571, 1576 (Fed. Cir. 1995)), the fact that it has been necessary to review the relationship between monetary assessments and the purpose they allegedly serve suggests that a percentage assessment upon the receipts of an enterprise is not entitled to the deference accorded a tax when the full amount of funds are transferred to private parties—together with the interest earned from the first day of its transfer, within ten days of collection.

Moreover, because all the monies generated are transferred to the licensees' competitors based upon a formula which denies the Illinois Racing Board any discretion to approve, deny or even modify how the monies are used by recipient private interests, this legislative allocation constitutes "impermissible favoritism" toward "private parties" justifying "a more stringent standard of review" by the Courts. (*Kelo v. City New London,* 545 U.S. 469 (2005), 125 S.Ct. 2655, 162 L.Ed.2d 439, Kennedy, J, Concurring).

The *Kelo* decision, in which a majority of this Court sided with the Connecticut city's use of its Eminent Domain powers to condemn private homes in a residential neighborhood in order to make the real estate available for private commercial development is a key precedent which must be assessed in the instant case. *Kelo* may be

distinguished from the instant case because the commercial real estate development was part of a change in zoning and urban planning, all of which required public hearings and deliberative process.

Moreover, a Taking of property for Public Use by the due process of Eminent Domain is an express power granted both to the Federal and State Governments by their constitutions. But in the instant case the Supreme Court of Illinois denied the very existence of a property right by legislative fiat and has erected a scheme to serve exclusively private interests.

It would seem difficult to create legislation that more clearly illustrates where the "impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause"[2] than the Illinois Act, which imposes a surcharge on one class of business in order to subsidize their presumed competitor. There is no question that it takes their money, the only real question is whether this form constitutes a Taking since it was accomplished by declaration of a 'finding' in legislation.

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[2] See generally: *Kelo v. New London, at 4 (Concurring Opinion o f Justice Kennedy).*

Clarity From the Highest Court On What Constitutes a Public Use for a Taking under the 5th & 14th Amendment to the U.S. Constitution Is Required To Secure Those Rights.

ARGUMENT

A. Clarity from the highest Court on what constitutes a Public Use for a Taking under the 5th & 14th Amendment to the U.S. Constitution.

Several Courts have recognized that a regulatory action can constitute a Taking, but the facts presented to the courts are seldom so egregious as the surcharge imposed upon the daily receipts of four licensed business in order to subsidize their nominal competitors. Accordingly, this Court has recognized that, "As elsewhere in takings law, the answers are found not in absolute rules for all cases, but by the particularized weighing of public and private interests."*Agins v. City of Tiburon,* supra, 447 U.S. 255, 260-261 (1980), 100 S.Ct. 2138, 65 L.Ed.2d 106; *San Remo Hotel,* 27 Cal. 4th 643, 677, 41 P.3d 87, 109, 117 Cal.Rptr.2d 269, 296.

The implications of the *Kelo* decision, in which the U.S. Supreme Court sided with the Connecticut city's use of its Eminent Domain powers to condemn private homes in a residential neighborhood in order to make the real estate available for commercial development must be assessed in the instant case. *Kelo* may be distinguished from the instant case because the commercial real estate development was part of a comprehensive development plan which

had required public hearings and deliberative processes. In addition, multiple legal challenges in state and federal courts had settled the factual issues allowing substantial reflection by various courts. In contrast, the instant case arose when the State of Illinois appealed a trial court's summary judgment against its statute directly to its highest court, where the state's Supreme Court conducted a de novo hearing rejecting all of Petitioner's claims—and then denied them a rehearing.

Moreover, *Kelo* involved the question of whether an exercise of the power of Eminent Domain was for a public use under an express power granted both to the Federal and State Governments by their constitutions. But in the instant case the Supreme Court of Illinois denied the very existence of a property right by deferring to legislative findings that a surcharge transferred to private parties serves a public purpose because it might create employment opportunities in an industry which if 'finds' to have been in decline for a decade.

It would seem difficult to create legislation that more clearly illustrates where the "impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is

warranted under the Public Use Clause"[3] than the Illinois Act, which imposes a surcharge on one class of business in order to subsidize their presumed competitors. There is no disputation that the surcharge upon their receipts takes the petitioners' money; the only questions are whether this violates property rights and is compensable since it is administered by a governmental body. To project a pretextual public purpose being served by the Act, the surcharge imposed to fund private parties passes momentarily through the 'hands of government' long enough to invoke a claim that it serves a public purpose. Justice Kennedy forecast that:

> "A court applying the rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying a rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular

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[3] See generally: *Kelo v. City New London*, 545 U.S. 469 (2005) *(Concurring Opinion o f Justice Kennedy, at 4).*

> class of private parties, with only pretextual public justifications." *Kelo*, 545 U.S. at 491 (Kennedy, A., concurring).

This surcharge upon the receipts of four businesses both injures a particular class of private parties for pretextual public benefits.

1. **The right to property is a foundational right by which all others are secured.**

The right to retain an ownership interest in private property legitimately acquired is a foundational Constitutional Right, protected by the Fifth Amendment in explicit terms. Its infringement requires both the exercise of "due process of law" and "just compensation." (*See generally:* U.S. Constit., Amnd. 5). But even when Due Process and Compensation is provided, the Taking must still be for a Public Use.

There is no need to infer the right to retain one's property from rights not expressly articulated as an element of the "liberty" interest. Indeed, the 5th Amendment separates the right to "property" by only that one word—"liberty," from "life" itself. But even

if it was necessary to so infer, the penultimate Framer of the U.S. Constitution, John Adams, argued that property is a prerequisite to liberty. As acknowledged in a California Supreme Court's Takings challenge to a development mitigation fees in *San Remo Hotel L.P. v. City & County of San Francisco*, , Adams contended that, "Property must be secured, or liberty cannot exist", because property and liberty, are upon examination, one and the same thing." *San Remo*, 27 Cal. 4th at 691-692 (Brown, J., dissenting, Chin, J. concurring in dissent).

This guarantee of property retention in the U.S. Constitution is the enabler of liberty. The Dissenting Opinion of California Supreme Court Justice Brown in *San Remo Hotel* further elaborated how closely related property and liberty are:

> "Private property is in essence a cluster of rights inuring to the benefit of the owner, freely exchangeable in accordance with the terms of private agreements, and recognized and protected by common consent. In the case of real property, this cluster of rights includes the right to exclude persons from certain physical space. In the case of intellectual property, it may include the right to employ a valuable method or process to the exclusion of others. In other words, private property

represents zones of individual sovereignty· regions of autonomy within which we make our own choice." *Id.* at 692.

2. Illinois erred in concluding money is not a form of property.

But several courts cited by the Illinois Supreme Court in *Empress* have erroneously denigrated liberty by holding money is not property, and have interpreted the "right to exclude" from "physical space" so narrowly as to circumscribe the Constitution's protection of private property only to its most physical form, "real property."

This denial that money is a form of property is an antiquated anachronism denying the foundational relationship between money and all other forms—including real property. Money is more than Legal Tender, presumed to be 'owned' by its possessor; money is the medium of exchange in modern society. (*See generally:* Bruce Ackerman, PRIVATE PROERTY AND THE CONSTITUTION 166 (1977): we no longer count our wealth first by land, farms, buildings, but instead by stocks, bonds, pensions.) Like the right to exclude trespassers from real property in order to maintain its value, the value of money can be maintained only by excluding its

simultaneous use by others. It retains its value only by 'excluding trespassers' who would depreciate its value by encumbering its use, or by its owner's refusing to co-sign notes secured by real property.

Money is the means by which almost all property—real and personal, is acquired from its previous owner. Money is how the right to retain the property is secured, by paying of property taxes to governmental bodies. Money is how real property is maintained by procuring such goods and services necessary to ensure it retains value. Money is how improvements on real property are secured, making that property more valuable in the eyes of the tax assessor. Indeed, money is the medium by which government compensates its owner when real property is taken by the State. (*See generally:* John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003)): money "is the currency with which government pays for property interests under the Takings Clause." (at 1038) (Pet'r's Pet. Cert. 25).

To suggest that what enables property ownership is not property before it is converted to a land estate and recorded at the county, but ceases to be property when paid in exchange for it, is to deny the existence of property during its transformative states. Denying that money is a form of property is akin to

denying that ice or water vapor—which contain the same two hydrogen molecules and one oxygen molecule are not—like liberty, as essential to life as water because they are not currently in liquid form due to the prevailing temperature.

This intertwined and enabling relationship between money and property was so commonly understood by the Framers as to require no distinction. As James Madison transcribed his notes from the debates of the Constitutional Convention, Madison recorded that the discussion of whether the government under the Constitution should have the powers to 'coin money,' establish bankruptcy and set other financial standards, emanated from concerns of the Framers that several States, operating under the Articles of Confederation, had diminished the value of property:

> "In the internal administration of the states, a violation of contracts had become familiar, *in the form of depreciated paper made a legal tender, of property substituted for money*, of installment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of the other states, relatively

> creditors, as well as citizens creditors within the state."[4]

Even the California Supreme Court has recognized that there is a "special potential for government abuse" meriting heightened scrutiny when a monetary burden is ad hoc and discretionary:

> "In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens, because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees." (See: *San Remo Hotel L.P.*, 27 Cal.4th at 672, accord, *Krupp v. Breckenridge Sanitation Distr.* 19 P.3d 687, 698 (Colo. 2001)).

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[4] James Madison, *Introduction, Debates of the Federal Convention of 1787*, in DEBATES OF THE FEDERAL CONVEITION, IN THE CONVETNION HELD AT PHILADELPHIA, IN 1787, WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATON., Rev. by Jonathan Elliot, Vol. 5, J.B. Lippincott Company, 1891, Second Edition, at 120, *emphasis added.*

Legislative history suggests that the Illinois General Assembly adjusted its AGR threshold, not to ensure fair distribution of the burden of assisting the horse racing industry, but rather, to obtain the necessary votes for its passage by exempting the casinos in Madison and St. Clair County, discussed *infra*. The financial threshold chosen— $200 Million in 2004's AGR, was selected specifically to exempt the Alton and East St. Louis casinos located in Madison & St. Clair Counties. This permitted legislators from those counties to benefit their local horse—Fairmount Park racing track, without also burdening the local casinos.

In *San Remo Hotel,* the California Supreme Court held that the "arbitrary and extortionate use" of mitigation fees should not withstand scrutiny. *Id* at 671. But by refusing to examine whether the Illinois Act was an "arbitrary and extortionate use," the Illinois Supreme Court rendered the surcharge and subsidy scheme immune from scrutiny.

While the financial threshold chosen might have been a rational choice in terms of building a political coalition, the Madison & St. Clair County casinos are likely to have been just as damaging to the horse racing track in Madison County as the ones in Will and Kane Counties—more than 250 miles away!

The California Supreme Court contemplated that abusing city council members would "face widespread and well-financed opposition" in the next election if they abused their power. *Id.* But in Illinois it could be argued that such 'opposition' is not viable, even that it would be a 'fools' errand' to challenge the established interests—as the nominating process in Cook County Illinois is so controlled by the Ward and Township Committeemen to render elections there virtually uncompetitive.

In the 'real-world' of Cook County, Illinois politics—unlike the theoretical world of San Francisco invoked in *San Remo Hotel,* the symbiotic relationship between the Ward Committeeman and the business and financial interests requiring the Committeemen's support for various municipal services and zoning variances, deters challenges to the party's political leadership. That political party's leadership in turn, chooses whom to Nominate for the legislature—and once nominated, the candidate appears on the General Election ballot with no, or only nominal, opposition.

3. **The discriminatory application of taxation based on geographic considerations can manifest a taking when it benefits businesses**

whose location also gives them political dominance.

By the Act at issue in the instant case, businesses located in two suburban 'collar' counties have been subjected to a surcharge that fund's competitors located in three counties which were once manufacturing centers. All of the businesses being taxed are located in Kane and Will Counties. All but one of the businesses receiving the proceeds of the tax are located in Cook and Madison Counties Only one of the counties—Will County, contains resident businesses which both pay the surcharge and receive the subsidy. The Circuit Court in that county ruled on Summary Judgment that the scheme violated the Uniformity Clause of the Illinois Constitution.

B. **When only three counties whose resident businesses directly benefit from a subsidy possess the majority of the legislature, their imposing the surcharge to fund it on businesses resident in only two other counties, higher scrutiny is merited of whether the nominal tax is a Taking disguised as a tax.**

This redistribution of income from the businesses resident in two counties to benefit those in three others has created the situation in which the direct financial interest of respondents have unjustified weight in the legislative process. Moreover, the

Senators and Representatives from Cook and Madison County constitute a majority of the membership in both the Illinois State Senate and the Illinois House of Representatives.

To illustrate, the legislative powers of the State of Illinois are vested in the Illinois General Assembly.[5] Each of the 59 Legislative Districts elects a Senator and is sub-divided to also be represented by two State Representatives.

Nineteen of Illinois 59 State Legislative Districts are comprised entirely of territory and voters in Cook County.[6] Those Legislative Districts elect 19 Senators and 38 Representatives, slightly less than one-third of each chamber.

Another seven Legislative Districts contain part of the territory and voters in Cook County.[7] They elect another 7 Senators and 14 Representatives. Combined, the Senators that represent all or part of Cook County constitute 26 of the 59 Members of the Senate and a 62-vote majority in the 118 Member Illinois House of Representatives.

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[5] It consists of a Senate of 59 Members and House of Representatives with 118 Members.

[6] These are Legislative Districts 1 – 18, and 20.

[7] These are Legislative Districts 19, 26 – 28, and 39 – 41.

Madison County, where Fairmount Park is located, dominates two additional Legislative Districts represented by two Senators and four Representatives. Fairmount Park lies only a few feet from the county-line separating it from St. Clair County, where many of its employees, vendors and customers reside. Madison County's territory also extends into two additional Legislative Districts, while St. Clair County shares one of those districts, as well as extending into a third.[8]

The Senators representing all or part of Madison County total 4, while five of the six Representatives elected from those Legislative Districts include part of Madison County. Adding them to those legislators representing all or part of Cook County, provides those two counties alone (Cook and Madison) with a 30-vote Majority of the State's Senate, and combines with Cook County's already existing majority in the House of Representatives to total 67 members.

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[8] Madison County contains almost all of the 56th Legislative District, and its coterminous 111th and 112th Representative Districts, with a small portion of the Legislative District including St. Clair County. The City of Collinsville, location of Fairmount Park also forms a significant part of the 51st Legislative District and 102nd Representative District. St. Clair County contains all of the 57th Legislative District other than a part of a single township of Madison County, as well as the 113th and 114th Representative Districts. A portion of St. Clair County is located in the 58th Legislative District and dominating the 116th Representative District.

If the elected members of the Illinois General Assembly voted solely based upon the pecuniary interests of their county, they would constitute a majority in both Chambers of 31 Senators and 68 Representatives. House Bill 1918, which became the Act at issue in the instant case, passed the lower House with 70 votes on April 26, 2006.[9]

The taking that occurred in Illinois escaped the meaningful democratic review anticipated in *San Remo Hotel* because of the opaque means of nominating the state legislators in Cook County. In the Legislative Districts which represent all or part of Cook County, only one State Senate candidate had a General Election opponent in 2006[10] --the year in which those who would vote to extend the surcharge and subsidy scheme in the Act to 2011 last appeared on the ballot. But the General Assembly members who enacted Public Act 94-804 were elected in 2002 or 2004.[11]

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[9] See: Roll Call No. 8, H.B. 1918, April 26, 2006,at http://ilga.gov/legislation/votehistory/94/09400HB1918_04262006_008000T.pdf.

[10] This was 19th State Legislative District.

[11] Approximately half of all Senators are elected every four years, to serve four year terms. All Senators faced election for either a two-year or a four-year term in new Legislative Districts in 2002, reflecting the redistricting that occurred

In 2002, Senators representing the 1st, 4th, 6th, 7th, 9th, 10, 12, 13th, 15th, 16th, 18th, 19th Legislative Districts within Cook County were elected to four-year terms in the Illinois Senate. That same year (2002), Ten of the 20 Senators elected from these Districts contained entirely in Cook County (Legislative Districts 1 – 19, and 33) had no opposition in the Democratic Primary. Thirteen of those 20 Senators nominated in their party's Primary, including all 10 who faced no Primary Opposition, also had no opponent in the General Election.[12] In addition, the Senator elected from 57th Legislative Districts, dominated by St. Clair County, faced no opposition in the Democratic Primary or the General Election.[13]

In 2004, Senators representing the 3rd, 5th, 8th, 11th, 14th, 17th & 20th Legislative Districts within Cook County were elected to four-year terms in the Illinois State Senate. That same year (2004), Senators representing the 21st, 23rd, 27th, 32nd, 33rd, 41st

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following the 2000 Census. In 2004, the Senators representing the following Legislative Districts were elected: 3, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, and, 59.

[12] *See Generally:* OFFICIAL VOTE, Cast at the Primary Election, General Primary, March 19, 2002, The State Board of Elections, Springfield, Illinois, at 67-72.

[13] Id., at 87-88.

Legislative Districts that include territory within Cook County were elected. All 7 of the seven Senators elected from the Districts contained entirely in Cook County (Legislative Districts 1 – 19, and 33) had no opposition in the Democratic Primary, and 5 of those seven Senators nominated without Primary Opposition also had no opponent in the General Election.[14] In addition, the Senator elected from 56th Legislative Districts, dominated by Madison County, faced no opposition in the Democratic Primary or the General Election.[15]

Combining the 2002 & 2004 elections, 17 of the 27 Senators representing Cook, Madison & St. Clair Counties at the time this legislation was before them had not faced a challenge before the voters in either their party's Primary nor the General Election.

C. Revelations Since the Illinois Supreme Court's Denial of Rehearing.

Subsequent to the Illinois Supreme Court's decision in the instant case, it has become publicly known

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[14] *See Generally:* OFFICIAL VOTE, Cast at the Primary Election, General Primary, March 16, 2004, The State Board of Elections, Springfield, Illinois, at 130-133.

[15] Id.

through a federal investigation's evidence presented at his Impeachment Trial by the Illinois State Senate, that then-Governor of Illinois, Rod Blagojevich, delayed signing an extension for two additional years of the surcharge and transfer scheme at issue here, while seeking to collect on a pledged political contribution linked to one of interests benefiting from the original legislation.

According to the Affidavit which provided Probable Cause for the U.S. District Court for the Northern District of Illinois to issue an arrest warrant for the then-Governor of Illinois, Rod Blagojevich, sought to collect $100,000 from a lobbyist seeking the Governor's signature on the legislation that extended the surcharge on casinos to subsidize the horse racing industry for two additional years.[16] The redacted transcripts of the telephone intercepts played in the Illinois State Senate's Impeachment Trial of Governor Blagojevich on multiple grounds illustrate the degree by which lobbyists and the Governor corruptly valued the surcharge and subsidy scheme to them.

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[16] *See generally:* Criminal Complaint, in *United States of America v. Rod. R. Blagojevich, and John Harris,* N.D. Ill., Dec. 7, 2008, Affidavit of Daniel W. Cain, Special Agent, F.B.I., at Part 2, "Information Obtained from Intercepted Phone Conversations Concerning Efforts to Obtain Campaign Contributions In Exchange for Official Acts," Item 68(e), at 39-40.

The redacted transcripts of four telephone conversations which occurred on November 13, December 3 & 4 of 2008 have now entered the public records of the Illinois State Senate and been published in newspapers, recounting cryptic conversations between then-Governor Blagojevich and his brother, Rob Blagojevich, in which the latter reports to the Governor on a conversation between an individual identified by the U.S. Attorneys' Office as "Lobbyist 1" and an individual referred to as John or "Johnny Johnson" in their conversations. A person bearing the same name is one of the owners business associated with the horse racing industry in Illinois.

It is unknown whether comparable considerations existed when the Act originally passed both houses of the General Assembly in 2006. But, the floor statement of Representative William Black during the final voting on the legislation indicates that the same Governor was previously engaged in actively persuading several members of the state's House of Representatives to change their vote to favor its passage. The floor statement of this Representative strongly hints at allegations of impropriety by his own colleagues.[17]

[17] ....I'm not going to question the motives of the Sponsor. I have voted for this Bill. I told you earlier of my background, an association with people who raise and breed and train horses, but *I've been here a long time now and I know when something doesn't smell right. Now, Mr. Speaker and Ladies and Gentlemen of the House, you don't get 12 or 14 people to change their vote on an issue like this, after two bites of the apple, unless something's going on* and I know something's going on....and if something is going on, why do I know that. The Democrat staff is positioned at each door of this chamber and have been for about an hour with a seating chart and if any Democrat leaves the chamber, they're asked where they're going, where they will be. So, obviously, they're anticipating a challenge to the vote and they wanna make sure those who have changed vote will be here for a verification. And I...and I bring this up 'cause this makes me very uncomfortable. And I didn't overhear anything, *I wasn't eavesdropping, but when a Democrat Legislator is standing at my desk and when one of your staffers comes up in an excited voice and says, 'Representative, the Governor and the Speaker want you to come down to the Governor's Office right now.'* Well, I'm sure she didn't go down there to be told what a wonderful job the House of Representatives is doing. You know the love that the Governor has for all of us. *I know why she went down there, ya get the Roll Call and ya look at 14, 15, 16 people that changed from 'no' to 'yes' on the Amendment. It might be interesting in the unlimited debate if somebody will tell us, what's the deal. What's the deal? Don't we ever learn anything around here? Didn't you read the verdict on a previous Governor?*

As reflected in the legislative history and noted by Representative Black, legislation that originally

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Haven't ya heard the U.S. Attorney saying there should be no quid pro quo in Illinois politics? Then what's going on? Why are some you called down to the Governor's Office, then you come back up and change your vote? *You voted 'no' twice on this Bill. You're gonna tell me that this has changed so dramatically that all of a sudden you're gonna vote 'yes'? Well, Mr. U.S. Attorney in Chicago, get your subpoenas out because I guess we're never gonna learn anything in the State of Illinois.* You wanna change your vote fine, but I don't think that's the reason some of you changed your vote. I can remember when the horseracing tax supported the agricultural premiums for the county fairs in this state, it hasn't been able to do so for a number of years. I like horses, but I don't like what I smell here. I don't like it at all. And some of you oughta stop and consider what you're doing because I have a reasonable suspicion that some of you have been, I don't wanna use the word, some of you have been talked to and perhaps convinced this suddenly is a good idea, but you didn't think it was a good idea the two previous times it was brought up. It'll be good to get the Roll Call and make sure that other people can see the Roll Call and then maybe you can answer questions from some people that you may not want to answer questions from. (See: Remarks of Representative William B. Black, in Debate on HR 1918, in State of Illinois, 94th General Assembly, House of Representatives, transcription Debate, 124th Legislative Day, 4/26/2006, at 63-64, *emphasis added.)*

applied the surcharge to more casinos was rejected twice in the same chamber, was unable to obtain sufficient votes for passage until the $200 Million AGR threshold was proposed. Even that threshold reportedly required unusual lobbying by the Governor of Illinois, according to that legislator's remarks favoring the bill, but disturbed by what he witnessed. Subsequently, it has been revealed by intercepted communications obtained by the U.S. Attorney for the Northern District of Illinois, and played at trial of Impeachment in the State Senate, that the Governor of Illinois had been promised and was seeking to collect prior to his approval, $100,000 in political contributions. This suggests that there never was a truly public purpose in the surcharge but that it was, instead, intended to serve the private interests of those who tainted the legislative process.

CONCLUSION

In the instant case, a taking occurred when legislation was enacted to amend Illinois' Riverboat Gaming Act to impose a surcharge upon the receipts of only four companies located exclusively in two suburban counties for the benefit of horse racing tracks located in three urban counties. The full amount of revenues generated from the surcharge—together with any interest earned on it, is then

transferred to the direct benefit of those private interests who own horse racing tracks. This is not a "tax" entitled to deference; but rather, it is the confiscation of private property by another private interest, using the State of Illinois as its collections' mechanism.

This misuse of the authority to raise revenues for Public Purpose amounts to a Taking under the 5th & 14th Amendments to the Constitution of the United States. Clarity from the Highest Court on what constitutes a Public Use for a Regulatory Taking is now required to secure those rights.

Respectfully, Submitted,

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(7)

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No. 08-945

IN THE
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,
Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Illinois Supreme Court concluded a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks was categorically immune from challenge under the Takings Clause of the Fifth Amendment because, in that court's view, "regulatory actions requiring the payment of money are not takings." The question presented is:

Was the Illinois Supreme Court correct in holding that financial exactions are completely unconstrained by the Takings Clause?

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Webb's Fabulous Pharmacies, Inc. v. Beckwith,
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Sup. Ct. R. 37.6 1

United States Const. amend V 4

OTHER AUTHORITIES

Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549 (2003) 1

Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 Wm. Mary Bill of Rts. J. 439 (2006) 7

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).....1

Nicole S. Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003). 2

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INTERESTS OF AMICI CURIAE

Amici Curiae Eric R. Claeys, Richard A. Epstein, Nicole S. Garnett, Eric A. Kades, and Ilya Somin are professors of law at various law schools throughout the United States who teach, research, write and speak about constitutional and property law.[1]

Professor Claeys is an Associate Professor of Law at the School of Law at George Mason University. He has authored multiple articles on the Takings Clause, including *Takings, Regulations, and Natural Property Rights,* 88 Cornell L. Rev. 1549 (2003).

Professor Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago and Kirsten Bedford Senior Fellow at the Hoover Institution. He has taught and written in constitutional law and political theory since 1968. His books include *Takings: Private Property and the Power of Eminent Domain* (1985).

Professor Garnett is a Professor of Law at the University of Notre Dame Law School. Her primary

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[1] Pursuant to Rule 37.6 of this Court's Rules, *Amici Curiae* certify that no counsel for a party has authored this brief in whole or in part, and no counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.2(a) of this Court's Rules, counsel of record for petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this brief. Petitioners have given blanket consent to the filing of briefs by *amicus curiae* and that letter of consent is on file in the Office of the Clerk. Respondents have consented to the filing of this brief, and Respondents' letters of consent are filed herewith.

research interests involve land use and government law, and she is the author of, among other articles, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003).

Professor Kades is Vice Dean and Professor of Law at William and Mary Law School, and is the author of *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 Nw. U. L. Rev. 189 (2002).

Professor Somin is an Assistant Professor of Law at the School of Law at George Mason University, where his research focuses on constitutional and property law. His published works include *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup. Ct. Econ. Rev. 183 (2007).

Amici Curiae have divergent views on many issues related to constitutional law and the Takings Clause in particular. *Amici Curiae* are united, however, in the view that this Court must resolve the disarray that exists in the lower courts and develop a comprehensive and coherent framework for analysis of the Takings Clause.

SUMMARY OF ARGUMENT

The Illinois Supreme Court rejected a Takings Clause challenge to a state law requiring the transfer of revenues from certain privately-held casinos to certain privately-held horse racetracks, reasoning that a state-imposed obligation to pay money can never be a constitutional "taking" of property. Specifically, Illinois Public Act 94-804 (the "Act"), 230

Ill. Comp. Stat 10/23 (1994), requires casinos with adjusted gross receipts over $200 million in 2004 to contribute, on a daily basis, three percent of their adjusted gross receipts to the Horse Racing Equity Trust Fund. Pursuant to the Act, 40 percent of the casinos' contributed funds are then distributed to five privately-held horse racetracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." Pet. App. 58a-59a. In response to a constitutional challenge, the Illinois Supreme Court upheld the Act, rejecting application of a Takings Clause analysis on the basis that the Clause does not apply to monetary exactions.

This Court has not hesitated to review the decisions of high state courts that, like this one, break new ground in interpreting the protections afforded by the Federal Constitution. Indeed, whether the Fifth Amendment's mandatory restrictions on a state's regulatory power can be applied to a governmentally imposed monetary exaction represents the archetypal "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Amici Curiae respectfully submit that the Court should give immediate attention to defining the proper constitutional standard to be applied to a state-imposed monetary exaction, and delineate the appropriate boundary between lawful taxation and unlawful confiscation. The reasons for granting certiorari are threefold. First, the Illinois Supreme Court's rigid rule is contrary to this Court's exaction

and regulatory-takings doctrines. Second, the Illinois Supreme Court's ruling endorses legislative exactions involving naked wealth transfers and invites state and local governments to undermine the substance of federal eminent-domain limitations. Finally, the issues raised in the petition are recurring ones for federal, state, and local government entities, and the want of a clear test to define appropriate governmental conduct is critical.

REASONS FOR GRANTING THE PETITION

I. The Categorical Distinction between Taxes and Takings Adopted by the Illinois Supreme Court is Constitutionally Unsupportable

The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This provision is made applicable to the states via the Fourteenth Amendment. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

In the court below, Petitioners urged that the constitutionality of the Act should be evaluated under the Takings Clause because property (money) was being taken from one party (the casinos) and given to another (the racetracks). The court below rejected the applicability of a takings analysis, reasoning that "[i]t is well settled that the takings clause of the federal and state constitutions apply only to the state's exercise of the power of eminent domain, and not to the state's power of taxation." Pet. App. 21a. The Illinois Supreme Court further concluded "[t]he

Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest." *See* Pet. App. 26a.

The court's rigid segregation between the powers of taxation and of eminent domain, and its limited view of the scope of the Takings Clause, require reexamination by this Court for four reasons.

First, this Court repeatedly has held that money is a property interest that may, in certain circumstances, be subject to protection under the Takings Clause. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). Moreover, because a necessary conceptual predicate of the Just Compensation provision of the Takings Clause is that all property can be converted into money, it is unclear why money should be treated differently from other forms of property when assessing the applicability of the Takings Clause. Nor is it coherent to exclude taxation or other monetary exactions categorically from the Takings Clause; taxes if unpaid give rise to tax liens, and liens are property interests. *Armstrong v. United States*, 364 U.S. 40, 44-45 (1960). Taxation is a form of property transfer. The necessity of taxation in any government suggests that there must be definite standards to distinguish legitimate taxation from confiscation; it does not suggest that taxation is never unconstitutionally confiscatory.

Second, the precedents upon which the Illinois Supreme Court relied in fashioning its categorical rule, such as *County of Mobile v. Kimball*, 102 U.S.

691, 703 (1880) and *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916), are not as absolute as the Illinois court suggests. For example, the court quotes *Kimball* for the proposition that "'neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution.'" Pet. App. 21a. But *Kimball* considers taxation where "the party bears only a share of the public burdens," *Kimball*, 102 U.S. at 703, not an exaction imposed on one party to give to another. Similarly, while this Court acknowledged the general rule that taxation does not run afoul of the Takings Clause in *Brushaber*, the Court also declared that

> this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property -- that is, a taking of the same in violation of the 5th Amendment. . . .

Brushaber, 240 U.S. at 24-25. Such arbitrariness may be exemplified when a few entities are the sole target of a legislative exaction.

Third, both *Kimball* and *Brushaber* predate the abandonment of the categorical exemption of regulation from the Takings Clause pronounced in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and its progeny.[2] Building on *Mahon*, this Court now

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[2] *Kimball* also predates the application of the Takings Clause to the states. *Kimball* was not decided under the Takings Clause,

uses a substance-over-form approach to determine whether a challenged government action undermines eminent-domain protections even if the action purports not to relate to eminent domain at all. The Court considers the character of the government action, the economic hardship on the subject of the action, the property owner's reasonable expectations, *Penn Central*, 438 U.S. at 124, and most of all whether a government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Incorrectly considering the issue settled by this Court's precedents, Pet. App. 21a-22a, the Illinois Supreme Court did not treat these considerations with anywhere near the seriousness this Court expects.

Fourth, the Illinois Supreme Court failed to explain why monetary exactions on the income earned from deploying property in economic activity should be treated differently from exactions on the use of property. In the latter context, this Court has been careful to ensure that conditions placed on land-use permits do not circumvent the protections of eminent-domain law, and thus has required that any

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but under the "substantive due process" doctrine of the *Lochner* era, which allowed challenges to state condemnations under the Due Process Clause of the Fourteenth Amendment. The relatively lax standards the *Lochner*-era Court adopted for review of state takings under the Due Process Clause have little, if any, relevance to modern review of condemnations under the Takings Clause of the Fifth Amendment. *Cf.* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup. Ct. Econ. Rev. 183, 240-244 (2007); Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 Wm. Mary Bill of Rts. J. 439, 441 and n. 19 (2006).

exaction have an "essential nexus" to a legitimate state interest and "rough proportionality" to the public burdens the use will create. *Dolan v. City of Tigard*, 512 U.S. 374-75 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Confiscations may masquerade as taxes or surcharges just as they may masquerade as permit conditions, and it makes no sense to exclude the former categorically from the reach of the Takings Clause. As in the land-use context, this Court should look to the substance and not the form of the exaction.

II. This Case Presents a Ripe Opportunity for the Court to Clarify Why Expropriative Transfers Violate the Takings Clause

As the petition demonstrates, there is deep disarray among both federal and state courts as to the applicability of the Takings Clause to laws that impose monetary exactions, and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), did not settle the question. Pet. 10-18. Thus, it is incumbent upon this Court to define the characteristics that distinguish lawful exactions from unlawful confiscation.

The answer cannot be that monetary exactions are categorically immune from challenge under the Takings Clause. An unrestrained power of government to impose special exactions, and to oblige the politically disfavored to fill the coffers of the favored, is pernicious in a system of private property. The normal political checks are evaded. Legislators can impose excessive exactions on targeted groups without the political costs of enacting broad-based taxes; politically powerful interests can secure benefits from targeted exactions upon rivals that they

could never obtain if they had to compete for general expenditures. Matters of this import cannot be left to the doctrinal incoherence of the fractured decision in *Eastern Enterprises.*

This Court previously has articulated certain elementary Fifth Amendment precepts. First, as noted above, the purpose of the Takings Clause is to protect some people from unfairly shouldering burdens that "should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Second, while "it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), naked wealth transfers – *i.e.*, robbing Peter to pay Paul – are strictly prohibited. *Thompson v. Consolid. Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937). Third, the exercise of governmental powers, such as land-use restrictions or other regulation, may *in extremis* amount to confiscation and give rise to a takings claim. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central*, 438 U.S. at 131.

These precepts clarify that naked wealth transfers in the guise of taxation, license fees, or surcharges run afoul of the Takings Clause. Just as this Court has established means-ends proportionality standards in *Nollan* and *Dolan* to root out unconstitutional takings in the land-use context, so too must the Court define federal standards that delineate when a special exaction for the benefit of a third party passes constitutional muster. This is separate from the question of whether governmental support of the third party is proper, or whether the

public would benefit economically from a revival of the third party's business; under *Armstrong*, there must also be a legitimate basis for burdening the particular taxpayer with the funding of that support (as opposed to paying for the support from general revenue or other sources). The legislative declaration here that a special surcharge on casino revenues is justified because racetracks have been "negatively impacted" from lawful competition from casinos, Pet. App. 56a, is not a legitimate basis for transferring the revenues of one competitor to another.

At present, the lower courts operate without proper guidance from this Court as to how the various standards of modern takings jurisprudence should apply in this context. *Cf. Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 548 (2005) (summarizing the different approaches). Yet as long as this Court does not clarify the proper analytical framework for addressing takings challenges to monetary exactions, lower courts will be tempted to conclude that *none* of the standards applies -- and continue to refrain from reviewing seriously expropriative transfers.

III. There Is a Pressing Need for this Court's Guidance

The issue presented is a recurring one for federal, state, and local government entities. As such, there is a vital need for this Court to articulate the appropriate test to be applied to monetary exactions, so that legislators are able to reasonably predict the contours of their levying powers. In the absence of a clear standard, governments may either overreach and trench upon citizens' constitutional rights, or

forgo necessary and beneficial legislation out of an abundance of caution. Further, no purpose would be served by waiting to review the issue presented until more courts have addressed it; it is for this Court to clarify the validity and applicability of its prior precedents like *Kimball* and *Brushaber*.

The Illinois Supreme Court's decision sanctions the transfer of revenue from a few profitable companies to a few less profitable competitors. Such a measure is arbitrary. The decision also undermines this Court's modern exactions jurisprudence by immunizing monetary exactions from the takings analysis. If monetary exactions can never be considered takings, then government may, at whim, undermine private property rights by simply imposing a special "surcharge" on any owner that refuses to accept arbitrary restrictions on the use of its property.

In times of economic distress, legislatures may be more tempted to engage in expropriative transfers from healthy to weaker competitors, making more imperative that this Court clarify the basic tenets for the courts and legislatures to follow.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

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In The
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASSOCIATION, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a State's expropriation of money from private parties is wholly outside the scope of the Takings Clause.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF has represented parties before this Court seeking to preserve the Constitution's equal protection guarantees. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). MSLF has also participated as an amicus

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

curiae to ensure that the Fifth Amendment is properly interpreted so as to secure the sanctity of property rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Wilkie v. Robbins*, ___ U.S. ___, 127 S.Ct. 2588 (2007).

In the instant case, the Illinois Supreme Court, relying on the concurring and dissenting opinions in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), created a per se rule that a State's expropriation of money can never be the subject of a taking. If this decision is allowed to stand, it will entice other States to take money from one disfavored constituency and simply give it to one that is more powerful. Because hundreds of MSLF's members are in the mining, oil and gas, livestock, and timber industries, they may next feel the wrath of a state legislature that simply desires to take money from them and give it to the industry du jour. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves a constitutional challenge to an Illinois statute that requires Petitioners to transfer 3 percent of their adjusted gross receipts ("AGR") to Illinois horse-racing tracks for the apparent purpose of improving the financial health of the

Illinois horse-racing industry. Petitioners' Appendix 1a. Nine riverboat casinos are currently licensed and operating in Illinois. *Id.* 1a-2a. Five casinos are located in the central or southern portions of Illinois, and the other four operate near Chicago. *Id.* Petitioners own the four Chicago-area casinos. *Id.* 4a.

There are five Illinois tracks that feature live horse racing. *Id.* 1a-2a. On-track betting at these tracks purportedly declined after the Riverboat Gambling Act and the horse-racing industry blamed riverboat gambling. *Id.* 2a-3a. In an apparent response to the horse-racing industry's complaints, in May 2006 the Illinois General Assembly passed Public Act 94-804 (the "Act"). *See id.* 2a-3a. The Act requires those casinos with AGR of more than $200 million to contribute 3 percent of their AGR to the Horse Racing Equity Trust Fund on a daily basis. *Id.* 2a. The casinos with AGR of more than $200 million are the four Chicago-area casinos owned by Petitioners. *Id.* 1a-4a.

The Act further provides that the money (together with interest earned thereon) be distributed from the Fund as follows: sixty percent of the proceeds is distributed to tracks as purses and the remaining forty percent of the proceeds is distributed directly to the tracks as an operating subsidy. *Id.* 2a. Because the Act gives the racetracks almost carte blanche as to how the forty percent of the subsidy may be used in their businesses, *id.*, this portion of the subsidy may go straight to the tracks' bottom lines.

Shortly after the Act became law, Petitioners filed this suit in Illinois state court challenging the Act's constitutionality. *Id.* 4a. Petitioners alleged, *inter alia*, that the 3 percent surcharge is an unconstitutional taking because it forces them to subsidize their competitors. *See id.* 4a-5a. After the Illinois trial court struck down the Act on state law grounds, Respondents appealed directly to the Illinois Supreme Court challenging the trial court's state-law ruling. *Id.* 5a-6a. Petitioners, on the other hand, defended the lower court's decision and reasserted their contention that the Act violates the federal Takings Clause because it takes money from them and gives it to their competitors. *Id.* 20a-26a. The Illinois Supreme Court, however, reversed the trial court's state-law ruling and rejected Petitioners' federal takings argument. *Empress Casino Joilet Corp. v. Giannoulias*, 896 N.E.2d 277, 290-93 (Ill. 2008).

On the takings question, the Illinois Supreme Court declared: "the takings clause[ ] . . . appl[ies] only to the state's exercise of eminent domain and not to the state's power of taxation." *Id.* at 291. The court also opined that "the same principle applies to fees, whether for certain service or licensing." *Id.* In reaching its conclusion, the Illinois Supreme Court relied on the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Aggregating the votes from the concurring and dissenting opinions, the Illinois Supreme Court reasoned that a five-member majority of the Court "rejected the theory

that an obligation to pay money constitutes a taking." *Empress Casino*, 896 N.E.2d at 292; *id.* at 293 ("five Justices of the Supreme Court in [*Eastern Enterprises*] reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings"). In short, the Illinois Supreme Court announced a per se rule that money can never be the subject of a taking.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CREATED BY THE FRAGMENTED DECISION IN *EASTERN ENTERPRISES*.

A. The Differing Opinions In *Eastern Enterprises*.

In *Eastern Enterprises*, this Court addressed the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722. 524 U.S. at 503-504. The Coal Act required companies that had been in the coal mining business to contribute to a fund that provided health care benefits to retired coal miners. *Id.* at 504-515. As to the petitioner, Eastern Enterprises, the Coal Act mandated that Eastern Enterprises pay health care benefits for persons it had employed between 1946 and 1965, the year it stopped participating in the coal mining business. *Id.* at 516-517. Specifically, Eastern was ordered to pay insurance premiums for more

than 1,000 retired miners who had worked for the company before 1966, with the premiums for a 12-month period exceeding $5 million. *Id.* at 517. Eastern asserted, *inter alia*, that the Coal Act constituted an unconstitutional taking of its property. *Id.*

The plurality opinion applied a Takings Clause analysis to the monetary liabilities imposed by the Coal Act. *Id.* at 522-537. The plurality began by noting that the aim of the Takings Clause is to "'prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 522 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Although the plurality acknowledged that takings claims usually arise when the government physically invades real property, it also recognized that "economic regulation such as the Coal Act may nonetheless effect a taking." *Id.* at 523 (citing *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982). In fact, the plurality quoted *Calder v. Bull*, 3 Wall. 386, 388 (1798), for the basic principle embodied in the Takings Clause that the government may not enact "'a law that takes *property* from A. and gives it to B.'" *Eastern Enterprises*, 524 U.S. at 523 (emphasis in original). The plurality then applied the well-known *Penn Central* three-part regulatory takings analysis and concluded that the Coal Act's allocation scheme, as applied to Eastern, constituted a taking. *Id.* at 530-537.

The four dissenters rejected the possibility that "an ordinary liability to pay money" could ever constitute a taking. *Id.* at 554-557 (Breyer, J., dissenting). Instead, they believed the Coal Act's imposition of liability on Eastern Enterprises should be analyzed under substantive due process:

> [T]here is no need to torture the Takings Clause to fit this case. The question involved – the potential unfairness of retroactive liability – finds a natural home in the Due Process Clause, a Fifth Amendment neighbor. That Clause . . . safeguards citizens from arbitrary or irrational legislation. And the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary.

Id. at 556-557. Surprisingly, the four dissenters concluded that the substantial retroactive liability imposed upon Eastern Enterprises was neither arbitrary nor irrational. *Id.* at 559-567.

The concurring opinion also rejected the plurality's conclusion that the Coal Act took property:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate

> upon or alter an identified property interest, and it is not applicable to or measured by a property interest.

Id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part). Thus, the concurring opinion believed that a takings analysis was inapplicable because Eastern Enterprises' substantial monetary obligation to pay money was not tied to a "property interest." The concurring opinion did, however, determine that the Coal Act's extreme retroactive liability violated principles of substantive due process. *Id.* at 549-550.

B. The Lower Courts Are Confused Regarding How To Interpret The Differing Opinions In *Eastern Enterprises*.

Following the fragmented decision in *Eastern Enterprises*, the lower courts have grappled with how to deal with constitutional challenges to monetary obligations. Some courts have followed *Eastern Enterprises*' plurality opinion and applied a takings analysis. *Cent. States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 807-808 (7th Cir. 1999); *Small Property Owners of San Francisco v. City and County of San Francisco*, 47 Cal.Rptr.3d 121, 129 (Cal. Ct. App. 2006) (*Eastern Enterprises* did not "expressly rule" that a "regulation, although mandating only the payment of money, cannot be subject to a takings clause analysis."). For example, in *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 414-

416 (2000), the Fifth Circuit analyzed a Louisiana state law requirement that insurers contribute money to a workers' compensation fund according to a formula based upon the insurers' volume of business in prior years. Following the same analysis as the plurality opinion in *Eastern Enterprises*, the Fifth Circuit held that the law constituted a regulatory taking. *Id.* at 416-420.

Other courts, including the Illinois Supreme Court in the instant case, have followed what has been characterized as the "second majority opinion" in *Eastern Enterprises*. Note, *The Death Of Nollan And Dolan? Challenging The Constitutionality Of Monetary Exactions In The Wake Of Lingle v. Chevron*, 87 B.U. L. Rev. 725, 750-751 (2007). These courts have aggregated the votes of the four dissenters and the concurrence to conclude that a majority of this Court in *Eastern Enterprises* rejected the theory that an obligation to pay money constitutes a taking.[2] *Empress Casino*, 896 N.E.2d at 292; *Gordon v. Norton*, 322 F.3d 1213, 1217-1218 (10th Cir. 2003) ("A majority of the [*Eastern Enterprises*] Court held that

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[2] This Court's "settled jurisprudence" is that, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgmen[t] on the narrowest grounds.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (emphasis added). This "settled jurisprudence" is not a two-way street. Thus, dissenting and concurring votes cannot be aggregated to create a holding of this Court.

the Coal Act was unconstitutional. . . . A different majority, however, concluded that the Takings Clause was not implicated by the Coal Act. . . ."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-1340 (Fed. Cir. 2001) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. . . . [W]e are obligated to follow the views of that majority."); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) (five justices in *Eastern Enterprises* rejected the conclusion that the Coal Act effectuated a taking); *Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (following the "majority" in *Eastern Enterprises* and holding that Takings Clause did not apply because the case did "not involve tangible personal property or real property"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) (In *Eastern Enterprises*, "[f]ive Justices . . . rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking.").

Another line of cases has held that no binding authority resulted from the fragmented decision in *Eastern Enterprises*. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2nd Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001); *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552-553 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-1255 (D.C.

Cir. 1998). Recently, in *Swisher International, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008), the Eleventh Circuit, purportedly "independently analyzed" whether an obligation to pay money may be subject to a takings claim. This analysis, however, was primarily based upon the "case law following *Eastern Enterprises*." *Id.* at 1056. Relying, in part, on the cases cited above that followed the "second majority opinion" from *Eastern Enterprises* the Eleventh Circuit ruled that an obligation to pay money cannot constitute a taking. *Id.* at 1056-1057.

C. This Court Regularly Grants Review To Resolve Confusion Among The Lower Courts.

This Court regularly grants review when the lower courts are confused regarding an important federal issue. *Grutter v. Bollinger*, 539 U.S. 306, 320-325 (2003) (granted review to clear up the confusion created by the fractured decision in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); *Marshall v. Marshall*, 547 U.S. 293, 305 (2006) (granted review to "resolve the apparent confusion among federal courts concerning the scope of the probate exception" to federal court jurisdiction); *Stewart v. Dutra Const. Co.*, 543 U.S. 481, (2005) (granted review to remedy confusion over how to determine whether a watercraft is a "vessel" for purposes of the Longshore and Harbor Workers' Compensation Act); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 669 (1982) (granted review to "resolve the confusion in the lower courts

respecting the impact of [*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)] on traditional rules for determining federal admiralty jurisdiction"). Because of the importance of the federal issue, this Court should grant review to resolve the confusion created by the fragmented decision in *Eastern Enterprises*.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS SUPREME COURT'S PER SE RULING, THAT AN OBLIGATION TO PAY MONEY CAN NEVER BE THE SUBJECT OF A TAKING, REDEFINES THE TERM "PROPERTY" TO EXCLUDE MONEY.

Based upon the purported "second majority opinion" in *Eastern Enterprises*, the Illinois Supreme Court ruled:

> The Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest. The case at bar does not involve the state's exercise of its eminent domain powers, but rather involves its exercise of its taxing powers. . . . As such, a takings analysis is not applicable to plaintiffs' claim.

Empress Casino, 896 N.E. at 293. In effect, the Illinois Supreme Court created a per se rule that an obligation to pay money can never be the subject of a taking because there is no identifiable property interest involved. Review by this Court is needed

because this per se rule redefines the term "property" to exclude money.

A. "Property" Secures "Liberty."

The origin of property rights in America can be traced to the Magna Carta (1215). *See United States v. Lee*, 106 U.S. 196, 228 (1882). Chapter 29 of the Magna Carta provides: "[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free customs . . . unless by the lawful judgment of his peers, or by the law of the land." Thus, the Magna Carta secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed., 1998). Importantly, the early American colonists believed the Magna Carta to be part of their birthright as English subjects. *Id.* For example, in 1687, William Penn advised the colonists "not to give away any thing of *Liberty* and *Property* that at present they do . . . enjoy." *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (William Bradford 1687)) (emphasis in original).

In 1690, John Locke published his famous *Second Treatise of Government*, in which he opined that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property

rights. John Locke, *Second Treatise of Government*, §§ 123-131 (1690) (C.B. Macpherson ed., 1980). According to Locke, private property existed under natural law before the creation of governments. *Id.* §§ 25-51. Locke further believed that the major purpose of government was to protect private property. *Id.* § 124 ("The great and *chief end* therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*.) (emphasis in original). More importantly, Locke equated property with liberty. *Id.* § 123 (Men are "willing to join in society with others, who are already united, or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*.") (emphasis in original).

Evidently influenced by Locke, "colonial leaders viewed the security of property as the principal function of government." *The Guardian of Every Other Right* 28. In fact, Thomas Jefferson incorporated Locke's compact theory into the *Declaration of Independence*:

> WE hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.[3]

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[3] Although Jefferson substituted "Pursuit of Happiness" for "estates," this change should not be interpreted as lessening the

(Continued on following page)

The Framers of the Constitution also recognized that "principles of good government started with the protection of private property[.]" Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." *The Guardian of Every Other Right* 43 (quoting 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., 1937)). Alexander Hamilton stated "[o]ne great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention of 1787* 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

In 1790 John Adams declared: "[p]roperty must be secured or liberty cannot exist." *Id.* (quoting *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851)). The next year, the Fifth Amendment became effective and expressly

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importance of property rights. In fact, "'the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.'" *The Guardian of Every Other Right* 29 (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (University of North Carolina Press 1980).

incorporated into the Constitution Adams' belief that property is fundamental to liberty. As finally adopted:

> [T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

The Guardian of Every Other Right 54 (emphasis added).

For over 200 years this Court has consistently recognized that private property is essential to a free society. In 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the

> common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-236 (1897) (citations omitted). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted). Accordingly, "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *The Guardian of Every Other Right* 26

(quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (New York 1775)).

B. "Property" Includes Money.

It is beyond doubt that money is included within Locke's definition of "property." For example, Locke believed that:

> The *supreme power cannot take* from any man any part of his *property* without his own consent: for the preservation of property being the end of government, and that for which men enter into society . . .

Second Treatise of Government § 138 (both emphasis is original). This limitation on government applied even to the part of government that had the most power over man, *i.e.*, the military. *Id.* § 139. In fact, in explaining this principle, Locke expressly equated money with "property":

> [T]he preservation of the army, and in it of the whole common-wealth, requires an *absolute obedience* to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them: but yet we see, that neither the serjeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish, can command that soldier to give him one penny of his money; nor the *general*, that can condemn him to death for deserting his

> post, or for not obeying the most desperate orders, can yet with all his absolute power of life and death, dispose of one farthing of that soldier's estate, or seize one jot of his goods; whom yet he can command any thing, and hang for the least disobedience.

Id. (underlined emphasis added).

More importantly, Madison, the principal drafter of the Takings Clause, was of a like mind. In a 1792 essay, he wrote that that the term "property":

> [I]n its particular application, means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right, and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or *money*, is called his property.

James Madison, *Property* (Mar. 27, 1792), available at http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (emphasis added). Madison then concluded that the "security of property" is jeopardized by "unequal," oppress[sive]," and "arbitrary" taxes:

> A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the

> poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.

Id. Accordingly, the term "property" in the Takings Clause includes money. *See Legal Tender Cases*, 79 U.S. 457, 580 (1870) (Chase, C.J., dissenting) (noting that the Takings Clause was designed to prevent expropriation of property of the kind historically associated with the issuance of paper money).

C. This Court Has Recognized That "Property" Includes Money.

This Court has long recognized that "property" includes money and that a monetary obligation may trigger the Takings Clause. For example, in *Norwood v. Baker*, 172 U.S. 269 (1898), this Court analyzed a special assessment imposed against landowners abutting a new street. The landowners argued that the special assessment constituted a taking because the monetary obligation far exceeded any benefit they received from the new street. *Id.* at 270-275. Although this Court recognized the power of municipalities to make special assessments under their general taxing authority, *id.* at 277-278, it cautioned that this "power" "is not unlimited." *Id.* at 279. In fact, "[t]here

is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." *Id.* Accordingly, this Court ruled: "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.*; *see Houck v. Little River Drainage District*, 239 U.S. 254, 275 (1915) (a taking claim may arise when the monetary "exaction is a flagrant abuse [of the taxing authority], and by reason of its arbitrary character is mere confiscation of particular property"); *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 24-25 (1916) (noting that when the monetary obligation "complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property[,]" it would rise to the level of a taking); *Dane v. Jackson*, 256 U.S. 589, 599 (1921) (A state tax law will be held to conflict with the Fourteenth Amendment when "it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation – 'to spoliation under the guise of exerting the power of taxing.'" (quoting *Bell's Gap R. Co. v. Pennsylvania*, 137 U.S. 232, 237 (1890)).

More recently, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court

struck down a Florida law that allowed a county court to expropriate the interest that was earned on the money held by the court during an interpleader action. In so doing, this Court ruled that the county's expropriation of the interest for its own use was analogous to the physical taking in *United States v. Causby*, 328 U.S. 256 (1946), where the government occupied air space over land, destroying its use as a chicken farm. *Id.* at 163-164; *accord*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (all nine members of this Court agreed that a state's expropriation of the interest earned on lawyer trust accounts constituted a per se physical taking).[4]

In short, this Court's precedent stands for the heretofore unremarkable proposition that the term "property" in the Takings Clause includes money. In the instant case, however, the Illinois Supreme Court redefined the term "property" so as to exclude money. This Court's review is necessary to correct the mistake made by the Illinois Supreme Court.

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[4] The primary disagreement between the members was how to value the property, *i.e.*, money, that was taken. Compare 538 U.S. at 235-240 with *id.* at 241-252 (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., ET AL.,
Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS STATE TREASURER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL TAXPAYERS UNION, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, CENTER FOR INDIVIDUAL FREEDOM, CITIZEN OUTREACH, CITIZENS FOR LIMITED TAXATION, EVERGREEN FREEDOM FOUNDATION, GRASSROOTS INSTITUTE OF HAWAII, HAWAIIAN VALUES, RIO GRANDE FOUNDATION, AND SMALL BUSINESS HAWAII IN SUPPORT OF PETITIONER

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William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). 8, 10

Interest of Amici

The 350,000-member **National Taxpayers Union** (NTU) is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountable elected officials at all levels.[1] NTU favors preserving the personal and property safeguards included in the United States Constitution and espouses the principle that private property rights are the foundation upon which a free society is built. NTU believes that its perspective on issues concerning the Takings Clause will be of assistance to the Court in evaluating the petition.

The **American Association of Small Property Owners** (AASPO) is a nonpartisan, nonprofit Section 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly—to make possible the American dream of building wealth through real estate. Based in Washington D.C., AASPO has affiliates in twenty-five states with members in

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[1] Counsel for all parties have been given at least 10 days notice of *Amici's* intention to file and have consented to the filing of this brief. Those consents are submitted herewith. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution.

Illinois. AASPO believes that the issues presented in *Empress Casino Joliet v. Giannoulias* have an important impact on the ability of small property owners to flourish.

The Center for Individual Freedom (CFIF) is a nonpartisan, nonprofit organization dedicated to protecting the individual rights and freedoms guaranteed by the United States Constitution. Since its founding in 1998, CFIF has appeared before this Court as *amicus curiae* in several cases involving individual liberties guaranteed by the Bill of Rights, including cases implicating the Fifth Amendment's protections of life, liberty and property. In this instance, CFIF maintains an interest in safeguarding the property protections specifically enshrined in the Takings Clause of the Fifth Amendment to the Constitution.

Citizen Outreach is a 501(c)(4) nonprofit, nonpartisan organization established for the purpose of grassroots advocacy at the federal, state and local levels. Reaching over 25,000 citizens each week through its newsletters and website, Citizen Outreach addresses issues as varied as lawsuit abuse, government regulation, privatization, health care reform, school choice, social security reform, tax and spending abuses, and illegal immigration, explaining these issues in terms the average citizen can understand and act upon. *Empress Casino Joliet v. Giannoulias* presents an important opportunity to address abuses in tax policy.

Citizens for Limited Taxation is Massachusetts' largest statewide taxpayers association. While the Commonwealth does not yet allow casinos despite the best efforts of the Governor,

Massachusetts does have racetracks and the ongoing debate here always reflects the interests of the two separate enterprises. In *Empress Casino Joliet v. Giannoulias,* the Court can provide a clarification of what should be an obvious fact: that one of them cannot be taxed to support the other, since this would set a precedent that any business can be given a special assessment by the state to support its competition.

Evergreen Freedom Foundation (EFF) is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government, and is supported by more than 4,500 Washington citizens. EFF staff provide public policy analysis to elected officials in the areas of state budgeting and taxation. This case presents a fundamental question pertaining to EFF's mission, in that Illinois' tax scheme could set a dangerous precedent in all states that would threaten the promotion of limited and accountable government as well as rational tax policy.

The mission of the **Grassroot Institute of Hawaii** (GRIH) is to promote individual liberty, the free market and limited accountable government. Through research papers, policy briefings, commentaries and conferences, the Institute seeks to educate and inform Hawaii's policymakers, news media and the general public. GRIH's members believe that each person must be free to succeed or fail in building wealth and in relationships with others, and as such several aspects of *Empress Casino Joliet v. Giannoulias* bear upon the organization's mission and goals.

Hawaiian Values is a 501(c)(4) nonprofit organization dedicated to preserving U.S. Constitutional principles in the 50th state. Hawaiian Values' support for Petitioners is not an endorsement of gambling; rather, Hawaiian Values urges the Court to grant the petition because of the serious implications involved in Illinois' seizure and arbitrary redistribution of private property from one private business to another. Hawaiian Values is concerned that the rationale of the Illinois Supreme Court, if left unreviewed, will be considered by the government—whether state, local, or federal—as an endorsement of the idea that government's function is to seize private property and redistribute it in order to fulfill some unannounced theory of economic justice. With the specter of the price tag for massive bailouts looming, and increasing pandering to entitlement voters, we are all dependent on the courts to protect the most basic American property rights.

The **Rio Grande Foundation** is New Mexico's only think tank dedicated to free markets and individual liberty. As such, the Foundation has a high level of interest in issues relating to taxation; specifically, that government should limit itself to the most basic activities for which private sector alternatives are the most difficult to attain and taxation should be used only to achieve these broad societal goals. As an organization that is concerned with the impacts of taxation, the Rio Grande Foundation espouses the philosophy that taxes should be broad-based and as fair as possible. Taxing one group and simply transferring the revenues generated by that tax to another, more sympathetic

special interest certainly violates those basic principles. The case before this Court, *Empress Casino Joliet v. Giannoulias,* deals directly with this matter.

Small Business Hawaii's (SBH) mission is dedication to promoting a better Hawaii through private, competitive, networked small businesses. SBH aims to foster job creation, reduce taxes, government regulations, and business costs, while promoting, educating, and effectively fighting for Hawaii's small business community. The organization was founded in 1975 and incorporated in 1976 as Small Business Association of Hawaii, a 501(c)(6) non profit association. Small Business Hawaii emerged in 1983. SBH's members are concerned about the implications that *Empress Casino Joliet v. Giannoulias* has for businesses in Hawaii.

Summary of the Argument

This case concerns a statute that requires a handful of companies from a small geographic area to pay a percentage of their adjusted gross revenues directly to another industry. Excusing this statute from Takings Clause scrutiny because the property taken is money needlessly limits the protection the Takings Clause was intended to provide to small groups singled out to bear disproportionate burdens.

If this statute is permitted to escape Takings Clause scrutiny, states will be free to require unpopular or geographically isolated industries to

subsidize those that have more political clout. In addition, laws—such as the one at issue here—that require a direct transfer from one small group to another defined group are exceptionally likely to lead to corruption. Thus, it is important that this Court consider whether such statutes are permitted under the Takings Clause.

Argument

I. A law that forces one segment of an industry to directly support another industry imposes a taking without just compensation.

The statute at issue in this case uses money extracted from a subset of one industry to subsidize another, favored industry. Petitioners—owners of four of the nine casinos in Illinois—are required to pay 3% of their adjusted gross revenues to Illinois horse-racing tracks.[2] This singling out of a small group to bear a disproportionate burden with no compensation is the very type of action the Takings Clause was intended to prevent. Excusing this statute from scrutiny because the property taken is

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[2] Notably, the original proposal was for all Illinois casinos to have to pay this fee to the horse-racing industry, but the law passed only after legislators limited its application to a minority of the casinos, all of which are located in a limited geographical area. *Compare* H.B. 1917, 94th Gen. Assemb. (Ill. 2006) *with* H.B. 1918, 94th Gen. Assemb. (Ill. 2006).

money needlessly limits the Takings Clause's protection of minorities.

The Takings Clause reflects concerns that were central to those who drafted and ratified the Constitution. The framers placed great importance on the protection of property from government power. To many of the framers, "property was the main object of society." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533-34 (Max Farrand ed., 1911) (quoting Governeur Morris). James Madison, the drafter of the Takings Clause, stated that "Government is instituted to protect property of every sort . . . ." THE COMPLETE MADISON at 267-68 (Saul K. Padover ed., 1953) (remarks published in NATIONAL GAZETTE, Mar. 29, 1792). A government that would not only fail to protect property rights, but also actively impair those rights without compensation, would be inimical to those principles. Thus, as William Paterson (a delegate from New Jersey) wrote later as a Justice of the Supreme Court, "[t]he preservation of property then is the primary object of the social compact. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation." *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

Individuals and groups may, in general, pursue their interests—including protection of their property—through representation in the democratic political process. However, when a small group disproportionately bears the burden of a law, political representation will not be as effective. Thus, other protections, such as the Takings Clause, may be

necessary. The requirement that government pay "just compensation" for taking property prevents it from allowing a majority to simply shift burdens onto a minority that does not have sufficient political power to protect itself.

In fact, James Madison believed that landowners were likely to become a minority and that the Takings Clause was necessary to protect property claims that were "in opposition to that of the majority." *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 853 (1995). While majority interests would be protected through the political process, a constitutional restriction was necessary to protect landowners.

Similar concerns were addressed in the takings clause of the Vermont constitution, one of the few takings clauses that predates the federal takings clause. When the territory that would later become Vermont was transferred to New York from New Hampshire, the New York legislature invalidated land grants made by New Hampshire, an act that was politically possible because the Vermont landowners were a minority in New York politics. When Vermont separated from New York, it inserted a takings clause in its constitution explicitly to prevent such a situation from occurring again. Treanor, *supra* at 827-29.

This concern for laws that burden a small group is not seen only in the Takings Clause. For example, the distinction between the protections that are necessary when actions burden many and when actions burden a small group may also be seen in administrative law, which requires adjudicative

hearings when a few people are burdened. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306-11 (1990). *See also* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 50 (1985) ("When a personal or narrowly held interest is at stake, the processes of representation are unlikely to be of sufficient help. Hence the rule, fundamental to administrative law, that the due process clause requires the right to participate only in adjudicative proceedings.").[3]

The concern with placing a disproportionate burden on a minority of citizens can be seen throughout this Court's Takings Clause jurisprudence. As the Court stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1969), the Takings Clause "was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Requiring payment of just compensation "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

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[3] It has been generally suggested that a "more searching judicial inquiry" may be necessary for statutes directed at "discrete and insular minorities" because such prejudice may curtail the operation of the political processes that would protect these minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Justice Thomas noted the relevance of this concept to the Takings Clause in his dissent in *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

The Court has consistently pointed to the problems inherent in forcing a small number of individuals to bear public burdens. For example, in *Nollan*, it stated: "If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987). As Justice O'Connor has stated, the Takings Clause protects "particularly . . . those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

The decision below, which restricts the protection of the Takings Clause to the confiscation (or regulation) of a specific real property or intellectual property asset, needlessly diminishes the protection given to minorities. The restriction is particularly burdensome because, for the majority of citizens, wealth is no longer measured by holdings of real property. *See* Treanor, *supra* at 812. "Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principal means of support consist of legal property: stocks, bonds, pensions, an assortment of rights granted by the activist welfare state." Bruce Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 166 (1977).

In addition, this Court has recognized that the line between taxing and taking may be difficult to

draw. While giving legislatures great leeway, the Court has recognized that extremely disproportionate burdens should not be permitted under the Takings Clause. In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 615 (1899), the Court suggested that it would be unconstitutional for a state to lay taxes that were "so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."[4]

At the most extreme case, it is clear that the line between taxation and confiscation of a specific asset is not tenable:

> Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to

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[4] State courts attempted to draw a similar line. For example, in *Cheaney v. Hooser*, 48 Ky. 330, 344-45 (1 B. Mon. 1848), the court stated: "[The Takings Clause] was not intended to exclude or even to restrict the ordinary power of general or local taxation inherent in the legislative function . . . . [The limit on the legislature] can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the Legislature was forming a just compensation, and that which is palpably not a tax, but is, under the form of a tax, or in some other form, the taking of private property for the use of others or of the public, without compensation."

> government in order to satisfy his tax obligation. This perception is at the core of the notion of confiscatory taxation. Indeed, revolutionary regimes have sometimes used the format of 100 percent taxation as the very vehicle of confiscation.

Walter J. Blum & Harry Kalven, Jr., THE ANATOMY OF JUSTICE IN TAXATION 15 (Univ. of Chicago Law School, Occasional Papers, 1973). To completely excuse the confiscation of any fungible asset from Takings Clause scrutiny ignores this problem and lessens the protection the Takings Clause was intended to provide.

II. If the law at issue in this case is not subjected to scrutiny under the Takings Clause, states may force disfavored industries or segments of industries to subsidize favored industries.

If the Illinois statute at issue here is permitted to stand, there is no reason for states to limit the application of the basic structure to casinos and horse racing. Industries that are unpopular or geographically isolated will be vulnerable to requirements that they subsidize those that are more popular or have more political clout.

In fact, this Court has already faced a similar situation in the agriculture context. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), Massachusetts propped up in-state milk producers with fees imposed on goods imported from outside the

state. Although the Court struck down that law under the Dormant Commerce Clause, the allure of such laws—as can be seen in this case—is not necessarily limited to situations where burdens can be placed on out-of-state entities. The workings of state legislatures may make geographic minorities within the state (as in this case)[5] almost as vulnerable as out-of-state entities.

In addition to out-of-state or geographically isolated industries, unpopular industries may also be targeted to subsidize industries that are more popular. Suppose, for example, that a statute required the three most profitable cold-medicine firms to pay a tax whose proceeds were funneled directly to less successful competitors who believe their research to develop a new vaccine against colds is more important to society. While finding a cure for the common cold may be a laudable goal—one the amici would prefer to see reached through private investment—the costs should not be borne by one segment of a politically disadvantaged industry alone. It is easy to envision a host of other situations in which a legislature will be tempted "to take property from A and give it to B," *Calder v. Bull*, 3 U.S. 386 (1798), if there are no limits on its actions.

Allowing a direct transfer from a small group of entities to another defined group also creates a fertile ground for corruption. There is less risk to a

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[5] As noted above, when the fee at issue here was originally proposed, it applied to all casinos in the state. However, it did not garner the votes necessary to be enacted until it was limited to only 4 casinos, all in the Chicago area. *See supra* at n.2.

legislator or executive in taking a bribe to enact a law like this, because such a small group of entities bear the burden, and therefore fewer people are likely to question or object to the legislator's or executive's actions. In addition, a small, defined group of beneficiaries receiving a direct payment is more likely to offer a bribe or "contribution" than if a large group of parties were receiving funds. A small group is not only likely to be receiving a larger benefit per member, it will be able to police "free-riders" who might otherwise avoid paying the bribe or contribution. Thus, the combination of a small burdened group and a direct transfer to a small benefited group is uniquely suited to encouraging corruption.

In this case, there are allegations that the governor did, in fact, demand "contributions" in exchange for effectively continuing the law. *See, e.g.*, Tamara Audi & Douglas Belkin, *Affidavit Alleges Blagojevich Sought Racing Official's Contribution*, WALL ST. J., Dec. 24, 2008, at A7. While these allegations are not necessarily relevant to the legal status of the law in this case, they illustrate the danger of permitting such schemes. Excusing them from Takings Clause scrutiny only increases their likelihood.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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